

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

867

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC.

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee.

On Appeal From Memorandum, Opinions, and Order of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 26 1967

Nathan J. Paulson
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC.

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee.

On Appeal From Memorandum, Opinions, and Order of the
Federal Communications Commission

JOINT APPENDIX

INDEX

	<u>Record Page</u>	<u>J.A. Page</u>
Prehearing Stipulation, dated March 31, 1967		1
Prehearing Order, Filed April 4, 1967		3
Letter of Transmittal dated May 7, 1965	1	3
Exhibit E1 — Engineering Data in Support of an Application for a New Standard Broadcast Station [Natick Broadcast Associates, Inc.]	2	4
Affidavit of Norman L. Rivers	4	4
Engineering Data	5	5
Letter of Transmittal, dated June 29, 1965 and Certificate of Publication, Filed on Behalf of Natick Broadcast Associates, Inc.	26	27
Commission Letter to Fly, Shuebruk, Blume and Gaguine, dated July 2, 1965	28	29
Letter of Transmittal and Petition for Reconsideration, Filed on Behalf of Natick Broadcast Associates, Inc., Received by the Commission August 2, 1965	29	30
Opposition to Petition of Natick Broadcast Associates, Inc. for Reconsideration, Filed on Behalf of Home Service Broadcasting Corp., Received by the Commission September 10, 1965	67	67
Letter of Transmittal and Reply, Filed on Behalf of Natick Broadcast Associates, Inc., Received by the Commission September 23, 1965	70	68-A
Commission Memorandum Opinion and Order Denying Petition for Reconsideration and Returning the Application of Natick Broadcast Associates, Inc., Released February 14, 1966	74	71
Petition for Relief, Filed on Behalf of Natick Broadcast Associates, Inc., Received March 16, 1966	77	74
Erratum to Petition for Relief, Filed on Behalf of Natick Broadcast Associates, Inc., Received by the Commission March 17, 1966	102	97
Objections to Petition of Natick Broadcast Associates, Inc., for Relief, Filed on Behalf of Home Service Broadcasting Corp., Received by the Commission, March 28, 1966	104	98

(ii)

	<u>Record Page</u>	<u>J. A. Page.</u>
Letter of Transmittal and Petition for Extension of Time, Filed on Behalf of Natick Broadcast Associates, Inc., Received by the Commission April 7, 1966	114	106
Letter of Transmittal and Reply to "Objections to Petition of Natick Broadcast Associates, Inc. Associates, Inc., Received by the Commission April 25, 1966	117	108
Commission Memorandum Opinion and Order Denying the "Petition for Relief" Filed by Natick Broadcast Associates, Inc., Released February 8, 1967	125	115
Letter of Transmittal, Application of Natick Broadcast Associates, Inc., dated May 29, 1967	132	125

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATICK BROADCAST ASSOCIATES, INC.,)	
)	
Appellant,)	
)	
v.	)	Case No. 20834
)	
FEDERAL COMMUNICATIONS COMMISSION,)	
)	
Appellee.)	

PREHEARING STIPULATION

The parties to the above-captioned proceeding have entered into a stipulation stating that the following questions are those presented by the instant appeal:

1. Whether the Commission's refusal in its February 14, 1966 and February 8, 1967 Orders (a) to allow Appellant to demonstrate the non-existence of prohibitive overlap, and (b) to afford Appellant's application comparative consideration with the mutually exclusive application of Home Service Broadcasting Corporation, was arbitrary, capricious and erroneous as a matter of law.

2. Whether the Commission's ultimate determination that Appellant's application, when originally tendered on May 10, 1965 violated the overlap provisions of 47 CFR 73.37(a), thereby rendering it unacceptable for filing, was arbitrary and erroneous.

3. Whether the Commission committed error in its February 14, 1966 and February 8, 1967 Orders in refusing:

(a) to designate Appellant's application for hearing to determine the extent of overlap, if any, and to grant a waiver of the Rules;

(b) to accept Appellant's retendered application nunc pro tunc as of May 10, 1965.

4. Whether the Commission's rejection of Appellant's application violated Section 303 of the Communications Act in that it did not select from amongst all qualified applicants, the one best suited to serve the paramount public interest, convenience and necessity (47 U.S.C. 303).

5. Whether the Commission's Orders deprived Appellant of due process, contrary to the requirements of Section 8 of the Administrative Procedure Act (5 U.S.C. 1007).

Filing of Joint Appendix

Counsel for the parties further stipulate that the Joint Appendix will be filed simultaneously with the filing of the Reply Brief, or, if Appellant files no Reply Brief, then within 15 days of the filing of the Brief of Appellee.

References to the record appearing in the various Briefs of the parties shall be to the page numbers in the original record certified to this Court. In the printing of the Joint Appendix, there will be set forth, in addition to the consecutive numbering of the pages of the Joint Appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the Briefs.

Respectfully submitted,
NATICK BROADCAST ASSOCIATES,
INC. (Appellee)

By /s/ Jerome S. Boros
30 Rockefeller Plaza
New York, New York 10020

/s/ Howard Jay Braun
1612 K Street, N. W.
Washington, D. C. 20006

FEDERAL COMMUNICATIONS
COMMISSION (Appellee)

By /s/ John H. Conlin

Associate General Counsel

March 31, 1967

[Filed April 4, 1967]

PREHEARING ORDER

Before: Bazelon, Chief Judge,
in Chambers.

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

[1]

[Rec'd-FCC-May 10, 1965]

FLY, SHUEBRUK, BLUME AND GAGUINE
New York, New York
May 7, 1965

* * *

* * *

Re: Natick Broadcast Associates, Inc.

Dear Mr. Waple:

Enclosed for filing, on behalf of Natick Broadcast Associates, Inc., are an original and two copies of an application for construction permit to erect a standard broadcast station on 1060 kc. at Natick, Massachusetts. Enclosed also are two additional copies of the engineering material in order to supply the Commission with the total of five required under instruction B of the application form. Finally, there is enclosed a check for \$50.00 in payment of the filing fee.

Please address a copy of any communications regarding this application to the undersigned at the New York office of this firm — 30 Rockefeller Plaza, New York, New York, 10020.

Very truly yours,

/s/ Jerome S. Boros

Mr. Ben F. Waple
Federal Communications Commission
Washington, D. C. 20554

Enclosures (6)

[2]

4

[2]

[Rec'd-FCC-May 10, 1965]

EXHIBIT E1
ENGINEERING DATA IN SUPPORT OF
AN APPLICATION FOR A NEW
STANDARD BROADCAST STATION
NATICK BROADCAST ASSOCIATES, INCORPORATED
1060 KC 1.0 KW DAYTIME
NATICK, MASSACHUSETTS

[3]

TABLE OF CONTENTS
[Omitted]

[4]

[AFFIDAVIT]

Commonwealth of Massachusetts) ss
County of Worcester)

Norman L. Rivers, being first duly sworn on oath, deposes and says:

That he is a Broadcast Engineering Consultant associated with Barkley & Dexter Laboratories, Incorporated, Fitchburg, Massachusetts;

That his qualifications are a matter of record with the Federal Communication's Commission;

That the firm of Barkley & Dexter Laboratories, Incorporated, has been engaged by Natick Broadcast Associates, Incorporated to prepare the attached application for a new Standard Broadcast station to serve Natick, Massachusetts;

That the calculations and exhibits in the accompanying report were made by him personally or under his direction;

That all facts contained therein are true of his own knowledge and belief except as to such matters as are based on information or beliefs and as to such statements he believes them to be true.

/s/ Norman L. Rivers
Affiant

[JURAT]

[5]

EXHIBIT E1
ENGINEERING DATA IN SUPPORT OF
AN APPLICATION FOR A NEW
STANDARD BROADCAST STATION

NATICK BROADCAST ASSOCIATES, INCORPORATED
1060 KC 1.0 KW DAYTIME
NATICK, MASSACHUSETTS

INTRODUCTION

This engineering exhibit has been prepared on behalf of Natick Broadcast Associates, Incorporated, in support of an application for a new Class II-D Standard Broadcast Station to serve Natick, Massachusetts, a town of 28,831 persons with no present local broadcast facility. This application is mutually exclusive with one submitted on behalf of the Home Service Broadcasting Corporation for the same facilities.

FACILITIES REQUESTED

This application proposes Class II-D operation on a frequency of 1060 kilocycles with a power output of 1.0 kilowatt, daytime.

TRANSMITTER LOCATION

It is proposed to locate the transmitter at 226 South Main Street in Natick, Massachusetts at geographical coordinates 42°15'59" North Latitude and 71°21'31" West Longitude as shown in Figure 4.

All known receiving and transmitting stations within 2 miles and all Broadcast stations within 5 miles are shown on Figure 4, as are the pertinent topographical features in the vicinity of the proposed transmitter location.

[6]

ANTENNA AND GROUND SYSTEM

The proposed radiating system as shown in Figure 1 is a single vertical, uniform-cross-section, guyed steel tower, 464 feet in height above the base insulator. The overall height above mean sea level, not including the top lighting, will be 612 feet. The overall height above ground, including top lighting, will be 470 feet.

The ground system, as shown in Figure 2, will consist of 120 equally-spaced #10 A.W.G. copper wires 232 feet in length and buried to a depth of 8 to 10 inches. This system will be installed in a marshy area and the assumed effective field at one mile will be 237 millivolts per meter.

[7]

AIRPORTS AND AIRWAYS

The location of all existing airports and airways within 10 miles of the proposed site are shown in Figure 10. The nearest established airway, designated V3 is located at a distance of 1.5 miles from the proposed site at a bearing of 350 degrees true.

The designation, distance and bearing to airports located within 10 miles of the antenna site are:

<u>DESIGNATION</u>	<u>DISTANCE</u>	<u>BEARING</u>
Marlboro	9.2 Miles	305° true
Norfolk (private)	9.6 Miles	185° true

[8]

(ASSUMPTIONS AND METHODS)

POPULATION

Population was determined by superimposing the various contours on a minor civil division map and estimating the percentage of each minor civil division lying within the contour. A uniform distribution of population was assumed.

Urban places lying between the 0.5 mv/m and 2 mv/m contours having population in excess of 2,500 were excluded.

The population within the 1 v/m contour was determined by a house count performed by the applicant. All population figures were based on the 1960 U.S. Census.

AREAS

Areas within contours were determined by polar planimeter and computations.

[9]

CONTOURS, CONDUCTIVITIES AND RADIATION

The distances to the various contours for all stations were based on the most recent information available, consisting of measured fields and radiation from proofs of performance, application data on file with the Commission, and in the case of non-directional operation, the radiation values shown in the "Official List for Information Setting Forth Notified Assignments of Standard Broadcast Stations of the United States" as of December 23, 1964 with supplementary data to March 10, 1965.

Canadian assignments were taken from the appropriate notification list for those stations concerned.

The "equivalent distance" method was employed where the paths involved more than one conductivity. FCC Map M-3 and the Canadian

Provisional Ground Conductivity Map were used as the basis for conductivity values as appropriate.

The following table lists: (1) The azimuths along which ground wave contours were calculated for all stations, (2) inverse distance fields used along each azimuth, (3) the basis for ground conductivity utilized and (4) pertinent FCC file numbers.

[10]

TABLE I

AZIMUTHS, RADIATION AND BASIS OF GROUND CONDUCTIVITIES
USED TO DETERMINE GROUND-WAVE CONTOURS

<u>Station</u>	<u>Azimuth (Degrees True)</u>	<u>Inverse Distance Field (mv/m)</u>	<u>Basis of Ground Conductivity</u>	<u>FCC File No.</u>
WHN	23°	2700	Proof of Performance to 20 miles; then FCC Map M-3	BZ-3312
	59°	2800		
	107°	2650		
WBZ	252°	2575	Proof of Performance October 8, 1940	---
	270°	2495		
	297.5°	2605		
WTIC	35° to 90°	1747	FCC Map M-3	---
WILD	All	195	FCC Map M-3	---
WBNC	90° to 200°	189	FCC Map M-3	---
CBA	230°, 236°, 240°	1732	FCC Map M-3 and canadian provisional ground conductivity map (as applicable)	---
WKOK	50°	980	FCC Map M-3	BL-10111
	60°	928		
	70°	782		
CJLR	160°	235	FCC Map M-3 and canadian provisional ground conductivity Map (as applicable)	
	170°	138		
	180°	56		
	190°	15		

[11]

TABLE IIAREA AND POPULATION DATA

<u>CONTOUR (MV/M)</u>	<u>POPULATION</u>	<u>AREA (Sq. Mile)</u>
1000	Less than 300	0.13
25	39,713	37.39
5	194,901	205.10
2	255,523	385.35
0.5	463,101	1217

[12]

ALLOCATION CONSIDERATIONS

Co-channel stations which were considered in this study are:

WRCV - Philadelphia, Pennsylvania 50 KW, DA-1, U

CJLR - Sillery, Quebec 10 KW, DA-1, U

Existing and proposed adjacent channel stations which were considered in this study are:

WBZ	Boston, Massachusetts	1030 KC	50 KW	DA-1, U
WHO	Des Moines, Iowa	1040 KC	50 KW	U
Proposed				
WHO	Des Moines, Iowa	1040 KC	750 KW	U
WHN	New York, New York	1050 KC	50 KW	DA-1, U
WBNC	Conway, New Hampshire	1050 KC	1.0 KW	D
CBA	Sackville, New Brunswick	1070 KC	50 KW	U
WKOK	Sunbury, Pennsylvania	1070 KC	1.0 KW-N 10 KW-D	DA-2
WTIC	Hartford, Connecticut	1080 KC	50 KW	DA-N
WILD	Boston, Massachusetts	1090 KC	1.0 KW	D

[13]

WRCV - PHILADELPHIA, PENNSYLVANIA

WRCV is a Class I-B assignment operating on 1060 kilocycles with a power output of 50 kilowatts and directional antenna system. The proposed Natick site is located at a distance of 251.77 miles from WRCV.

The pertinent groundwave contours of WRCV and the proposed Natick station are depicted in Figures 6 and 8. It can be seen that there is no overlap of the respective .025 mv/m and 0.5 mv/m or .005 mv/m and 0.1 mv/m contours.

At a distance of approximately 179 miles the critical angle of departure from the proposed Natick to WRCV for determination of the Day-time Radiation limits is 39.5° . At this angle, the maximum allowable daytime radiation to WRCV is 245 mv/m.

Using the half-wavelength antenna proposed, the expected radiation at this angle is 90 mv/m allowing adequate protection to WRCV.

CJLR - SILLERY, QUEBEC

CJLR operates with a power output of 10 kilowatts on 1060 kilocycles and directional antenna system. As shown on Figure 6, there is no overlap of the respective 0.5 mv/m and .025 mv/m contours of CJLR and the proposed Natick assignment.

WBZ - BOSTON, MASSACHUSETTS

WBZ operates directionally on 1030 kilocycles with a power of 50 kilowatts. As shown in Figure 7, there would be no overlap of the 25 mv/m contours of WBZ and the proposed station in Natick.

[14]

WHN - NEW YORK, NEW YORK

WHN operates on 1050 kilocycles with a power of 50 kilowatts and directional antenna system. As shown in Figure 6, there will be no overlap of the 0.5 mv/m contours of WHN and proposed Natick.

WBNC - NORTH CONWAY, NEW HAMPSHIRE

WBNC operates on 1050 kilocycles with a power output of one kilowatt. As shown on Figure 6, there will be no overlap of the respective 0.5 mv/m contours.

CBA - SACKVILLE, NEW BRUNSWICK

CBA operates with a power of 50 kilowatts on 1070 kilocycles. Figures 6 and 7 show adequate separation between the 0.5 mv/m contours of CBA and the proposed Natick station to prevent mutual interference.

WKOK - SUNBURY, PENNSYLVANIA

WKOK operates on 1070 kilocycles with a daytime power of 10 kilowatts and directional antenna system. Figure 6 shows no overlap of the 0.5 mv/m contours of WKOK and the proposed Natick assignment.

WTIC - HARTFORD, CONNECTICUT

WTIC operates on 1080 kilocycles and power of 50 kilowatts, non-directional daytime. Figures 6 and 7 depict the adequate separation of the respective WTIC and proposed Natick 25 mv/m and 2 mv/m contours.

WILD - BOSTON, MASSACHUSETTS

WILD operates on 1090 kilocycles with a power of one kilowatt. Figure 7 shows the WILD and proposed Natick 25 mv/m contours with adequate separation to avoid interference.

WHO - DES MOINES, IOWA

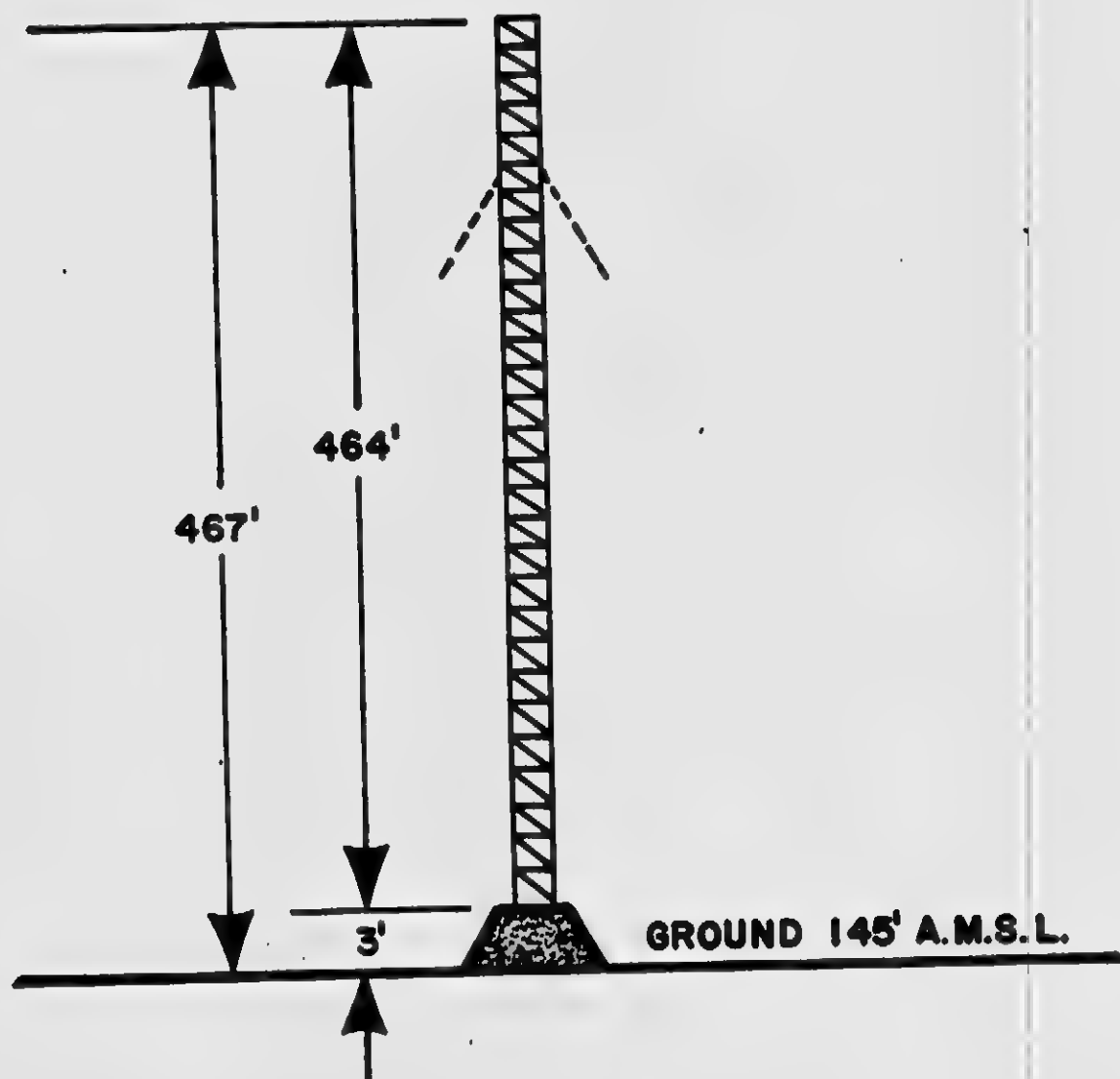
WHO operates on 1040 kilocycles with a power output of 50 kilowatts. There is an application on file for 750 kilowatt operation on the same frequency.

This application meets the requirements contained in Section 1.569 of the Rules in the following manner:

1. As shown in Figure 9, the proposed site is located inside the area encompassed by a 500 mile extension of the 0.5 mv/m 50% night-time contour of WHO.
2. There will be no interference or prohibited overlap to WHO assuming a power increase to 750 kilowatts.
3. No Class II-A assignments would be involved, as the nearest point on the 0.5 mv/m 500 mile extension lies off the coast.
4. There is no specified Class II-A assignment to be considered.

**TOWER PAINTING AND LIGHTING
TO F.A.A. SPECIFICATIONS**

BARKLEY & DEXTER LABS. INC.
FITCHBURG, MASS
APRIL 1965

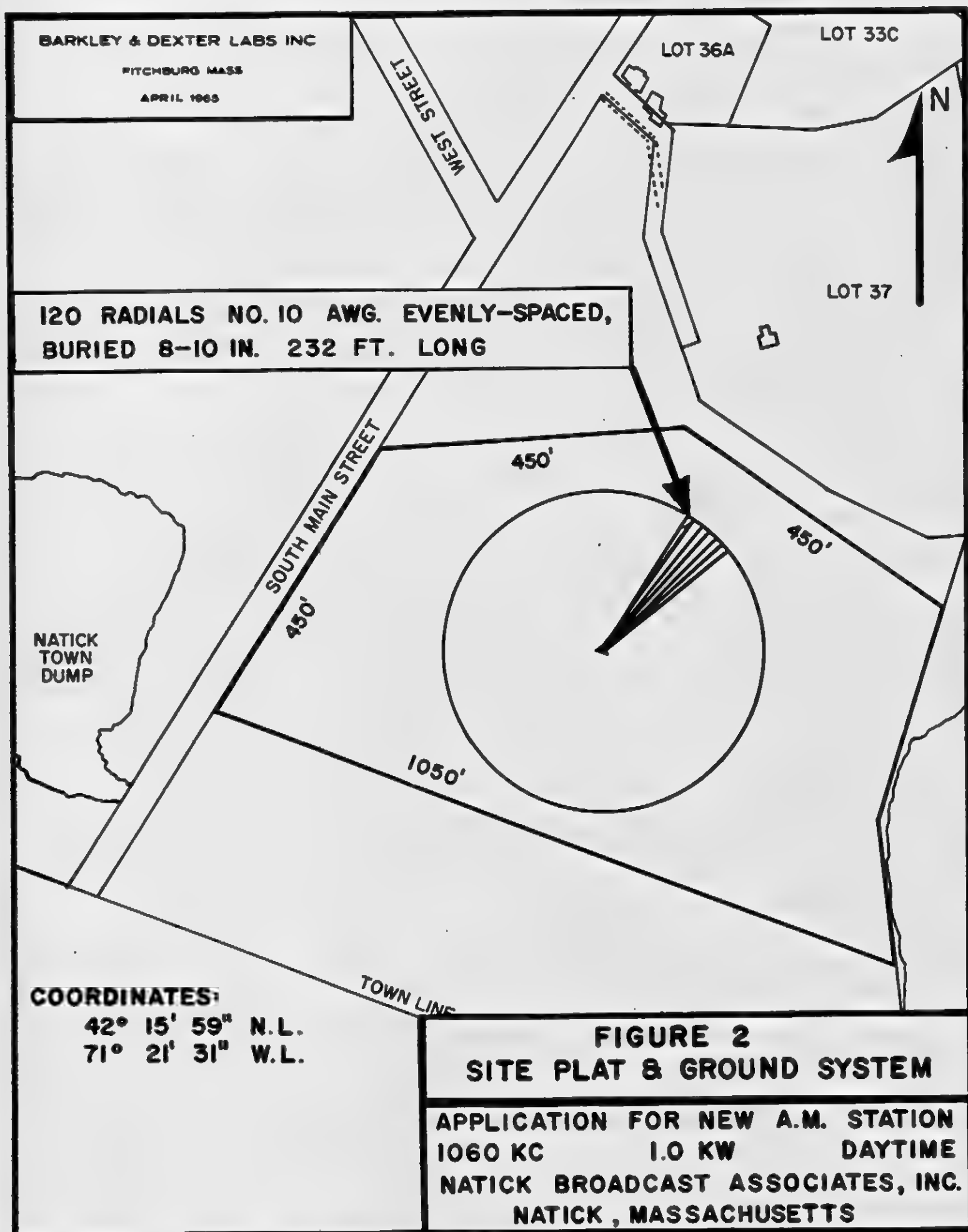


COORDINATES:

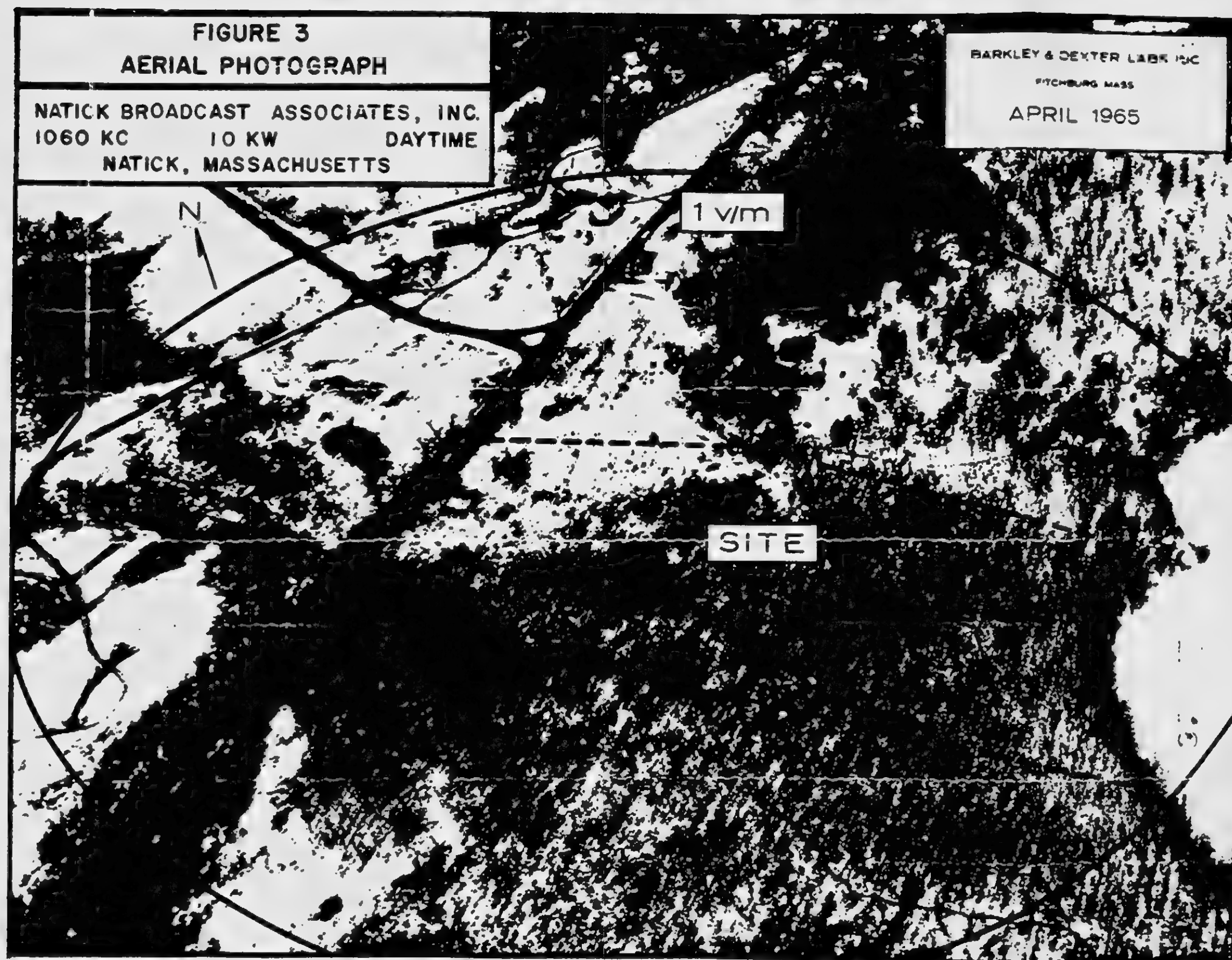
42° 15' 59" N.L.

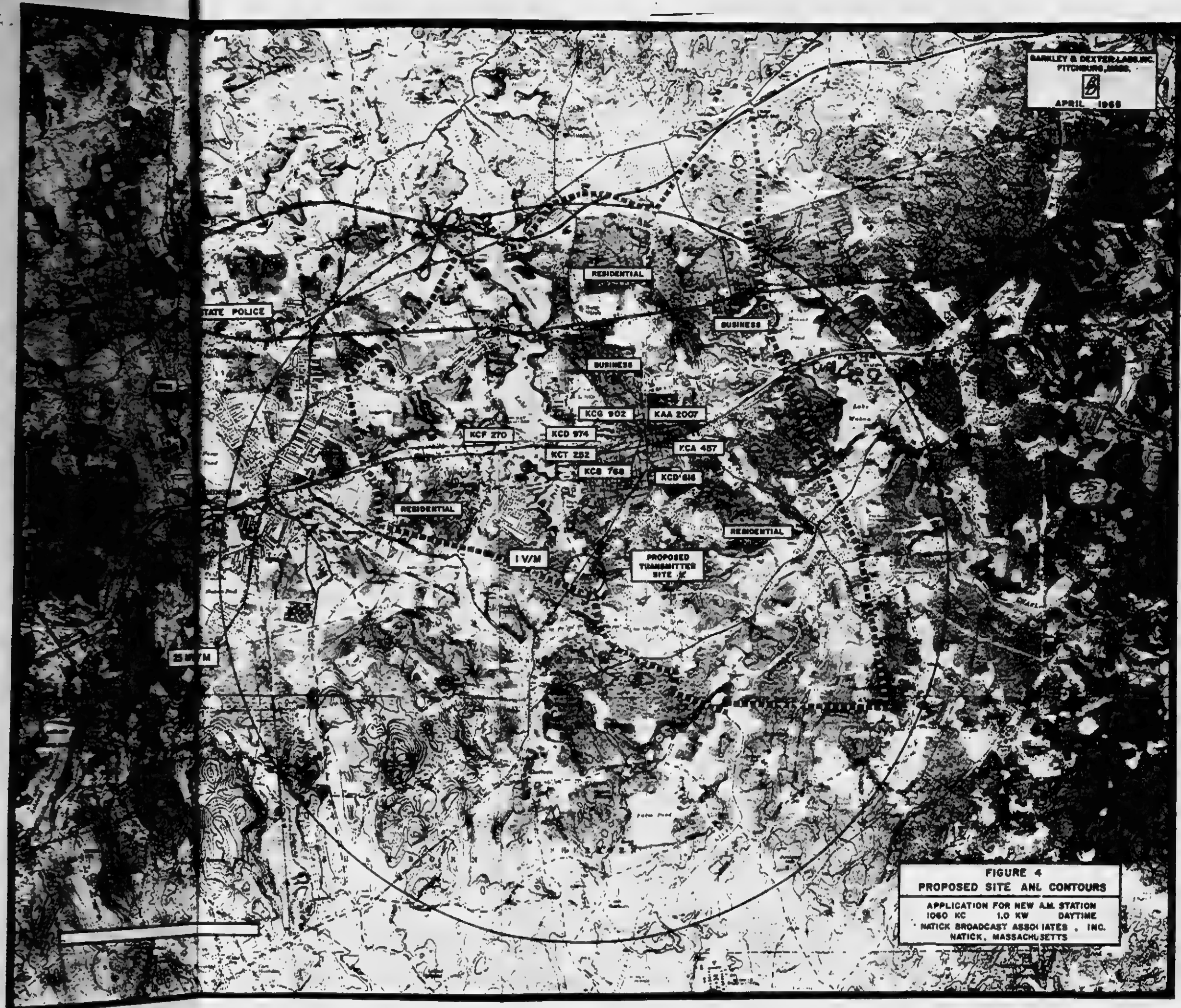
71° 21' 31" W.L.

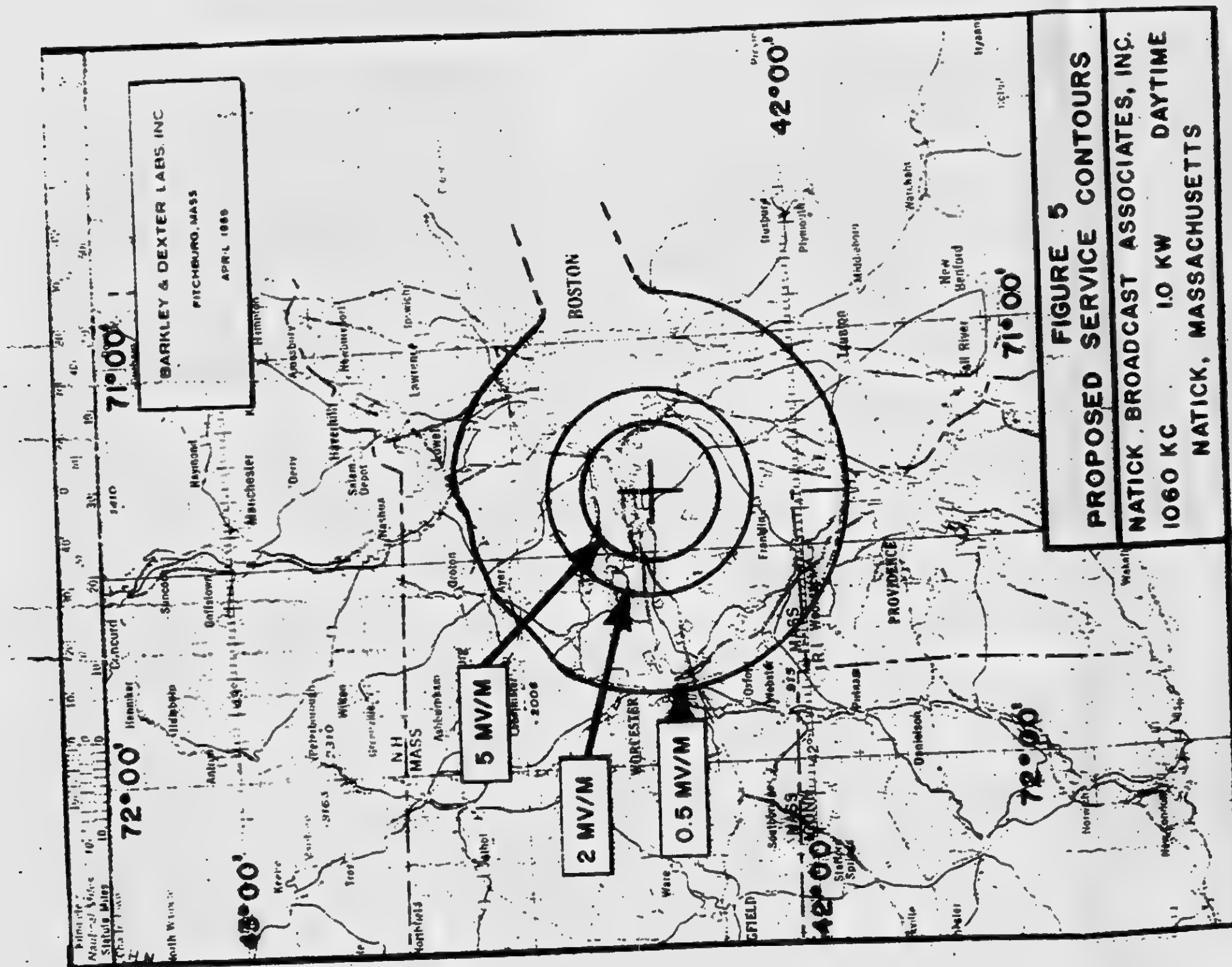
FIGURE 1
ANTENNA SKETCH
APPLICATION FOR NEW A.M. STATION
1060 KC 1.0 KW DAY
NATICK BROADCAST ASSOCIATES, INC.
NATICK, MASSACHUSETTS

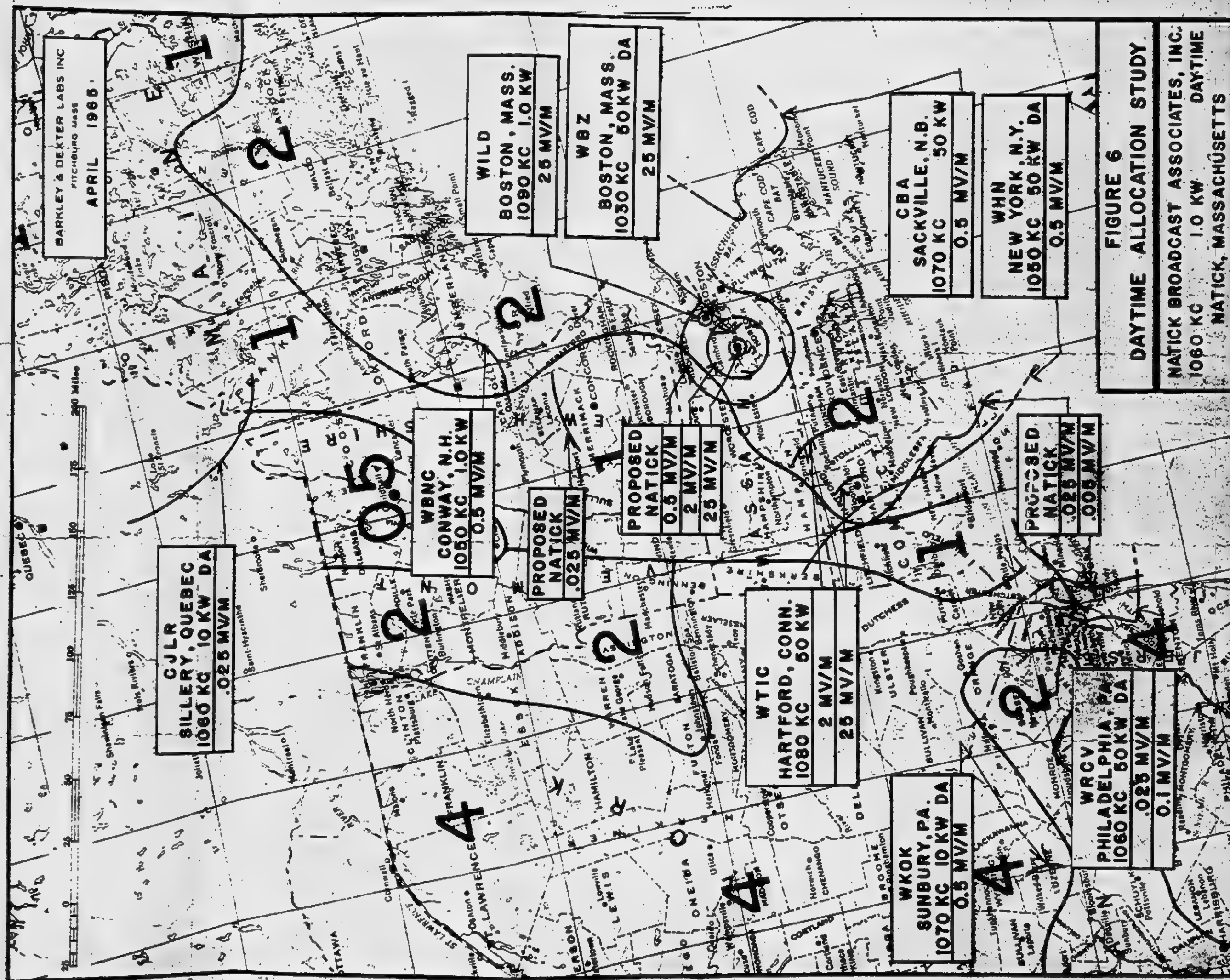


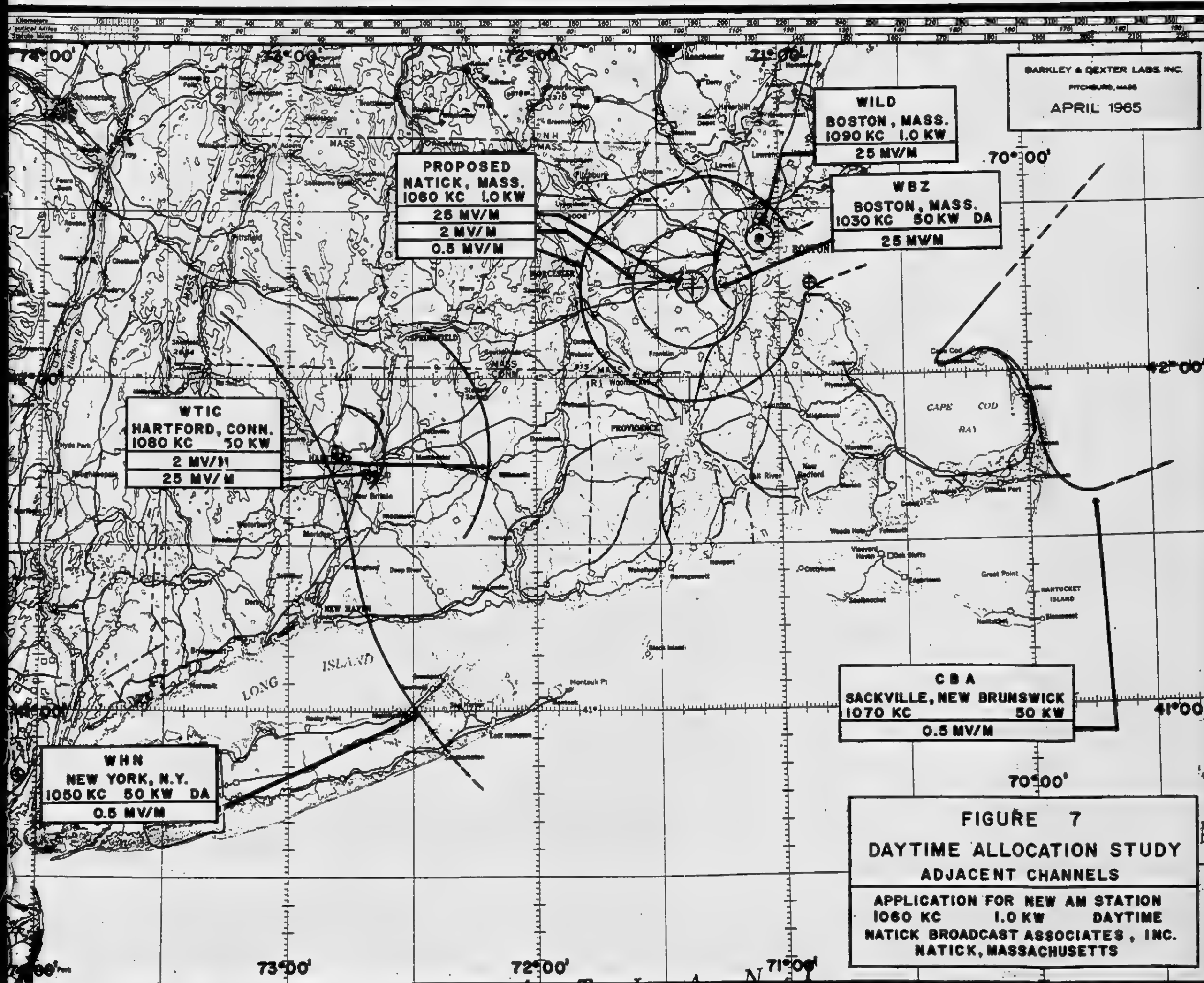


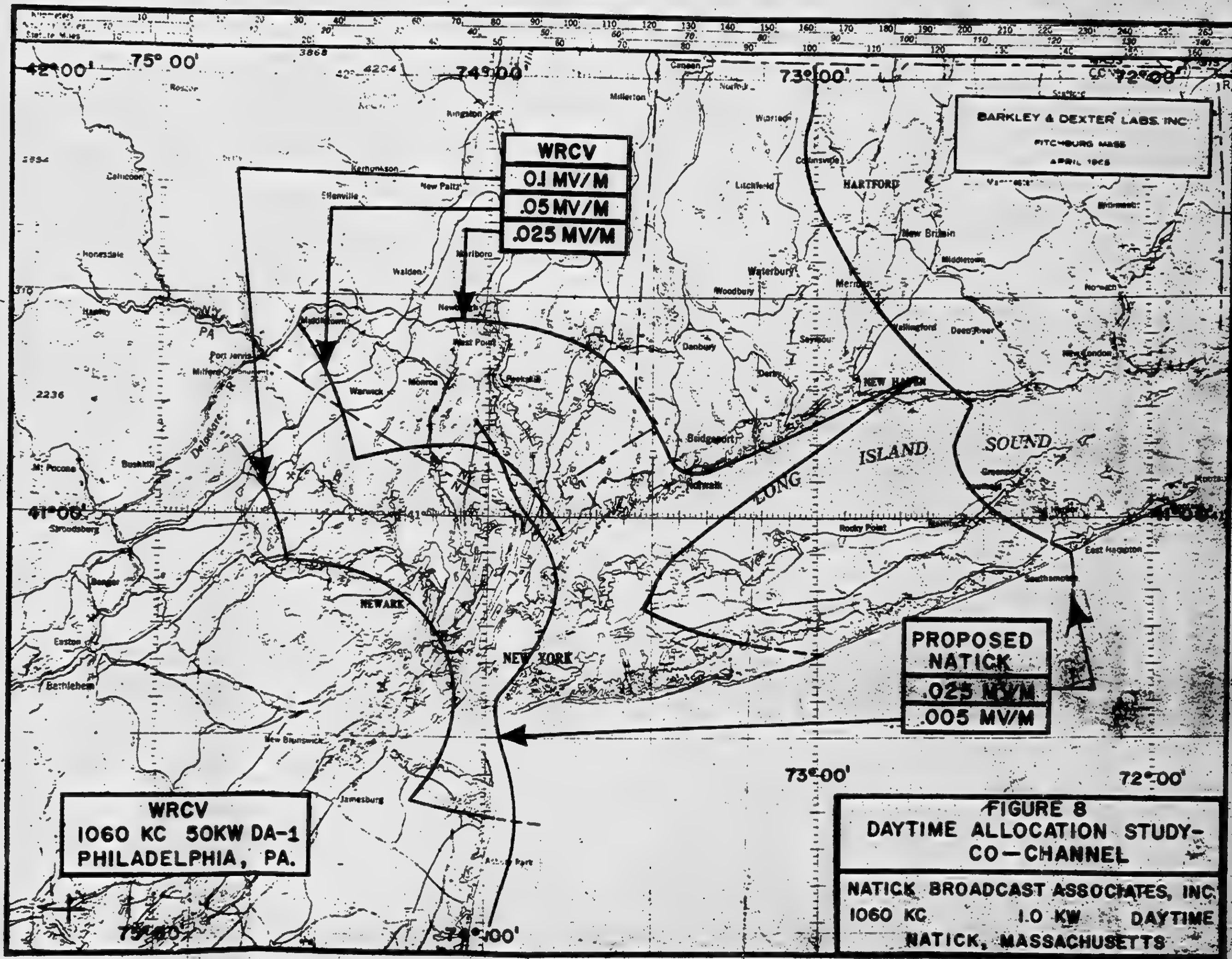














BARKLEY & DEXTER LABS. INC

FITCHBURG, MASS

APRIL 1965

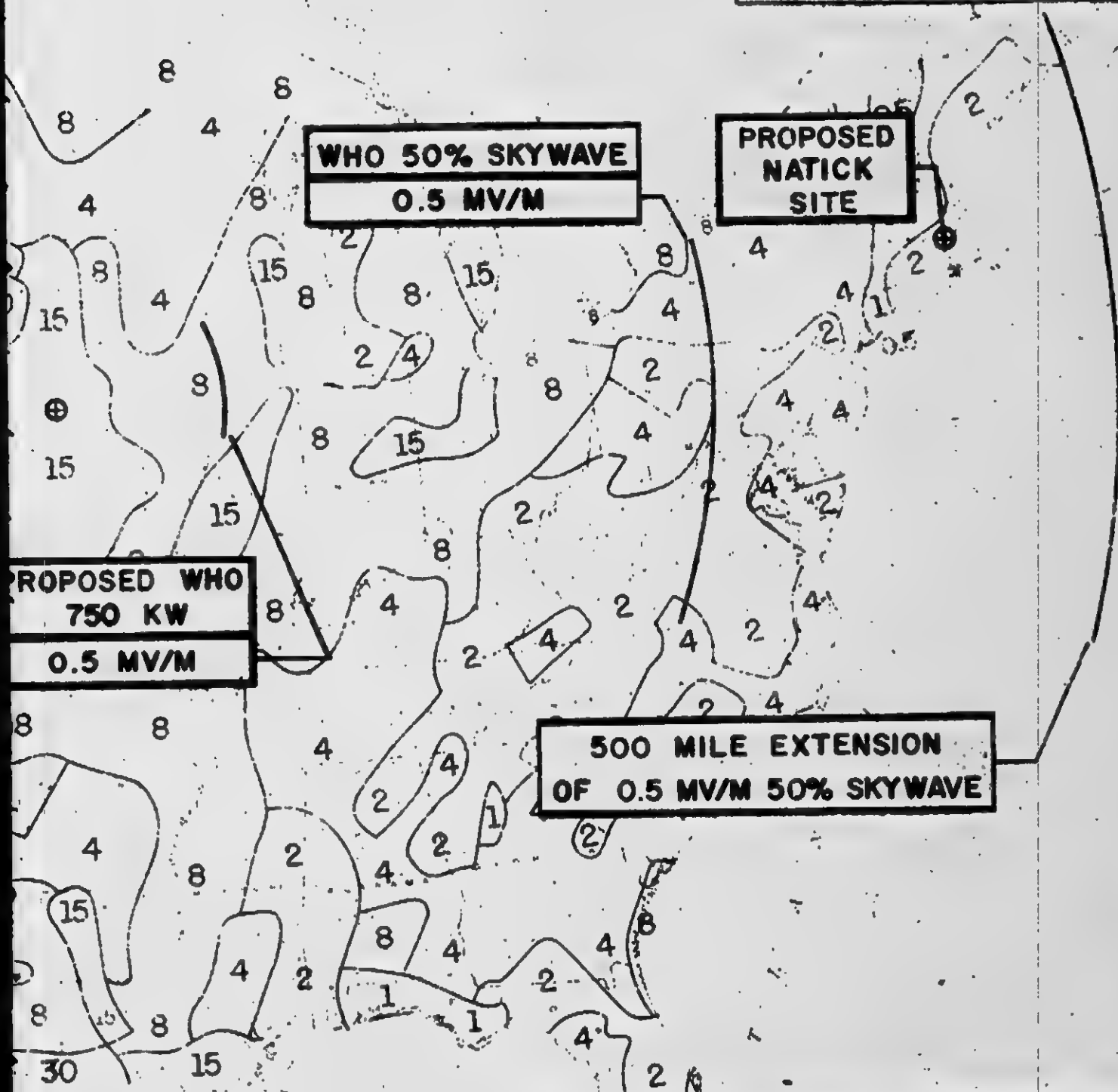


FIGURE 9

CLASS I-A CHANNEL STUDY-WHO

NATICK BROADCAST ASSOCIATES, INC.

1060 KC

1.0 KW

DAYTIME

NATICK, MASSACHUSETTS



27

[26]

[Rec'd-FCC-June 30, 1965]

FLY, SHUEBRUK, BLUME AND GAGUINE
30 Rockefeller Plaza
New York, New York
June 29, 1965

* * *

* * *

Re: Natick Broadcast Associates, Inc.
Natick, Massachusetts

Dear Mr. Waple:

Enclosed for filing, in triplicate, pursuant to Section 1.580(h) of the Commission's Rules is a certificate of publication of notice of filing of application by Natick Broadcast Associates, Inc. for a construction permit on 1060 kc., in Natick, Massachusetts.

Please address any communications regarding this certificate to the undersigned at the New York office of this firm — 30 Rockefeller Plaza, New York, New York 10020.

Very truly yours,

/s/ Jerome S. Boros

Mr. Ben F. Waple
Federal Communications Commission
Washington, D. C. 20554

Enclosures (3)

[27]

28

[27]

[Rec'd-FCC-June 30, 1965]

June 21, 1965

* * *

To Whom it may Concern:

SUBURBAN
FREE PRESS

Serving
Framingham
Cochituate
Wayland
Sherborn
Ashland
Natick
Dover

I certify that the following notice appeared in the Suburban Free Press published weekly in Natick, Mass. with circulation of 14,000 on May 20, 1965, May 27, 1965, June 3, 1965.

LEGAL NOTICE

PUBLIC NOTICE

Notice is hereby given that on May 10, 1965, an application was tendered for filing with the Federal Communications Commission for a construction permit for a new Class II-D standard broadcast station to serve Natick, Massachusetts on a frequency of 1060 kc with power of 1 kw., daytime, and with antenna at 470 feet above ground and with transmitter located at 226 South Main Street, Natick and studio located at a site in Natick to be determined, by Natick Broadcast Associates, Inc. whose stockholders, officers and directors are Edward F. Perry, Jr., Roland J. Boucher, Jr., William F. Miller, Newell B. Kurzon, Stanley H. Feldberg, Sumner Feldberg, Richard A. Smith and Leon M. Fox.

—
SUBURBAN
RECORDER

Serving
Millis
Medway
Medfield
Holliston

—
Published Every
Thursday
at
60 NORTH AVENUE
NATICK, MASS.

* * *

Cordially,

/s/ Herbert Cole
Advertising Manager

HC/vlf

[28]

[Mailed July 2, 1965]

July 2, 1965

6720

Fly, Shuebruk, Blume and Gaguine
30 Rockefeller Plaza
New York, New York 10020

Gentlemen:

Reference is made to the application of Natick Broadcast Associates, Inc., tendered for filing on May 10, 1965 for a new standard broadcast station at Natick, Massachusetts to operate daytime only on 1060 kilocycles with one (1) kilowatt of power utilizing a non-directional antenna system.

A preliminary examination of the application reveals that, contrary to the showing contained therein, the proposed 0.005 mv/m ground wave contour would overlap the 0.1 mv/m groundwave contour of Station KYW, Philadelphia, Pennsylvania, 1060kc, 50 kw, DA-1 Unlimited time. Commission study indicates that the proposed 0.005 mv/m contour would extend a greater distance than indicated by the applicant studies. In this regard, it appears that you may not have computed the extent of the proposed 0.005 mv/m contour along certain critical azimuths involving salt water paths.

It should be particularly noted that since a preliminary study of the application disclosed the deficiency noted above, a detailed study was not made to determine if other problems may exist which would preclude acceptance of the application.

Since the overlap involved is prohibited by Section 73.37 of the Commission Rules, the application is not acceptable for filing and is returned herewith. One copy of the engineering exhibit is being retained by the Commission for future reference.

Very truly yours,

/s/ Ben F. Waple
Secretary

Enclosures: Appl. FCC Form 301(3)

cc: Natick Broadcast Assoc., Inc.
Barkley Dexter Laboratories, Inc.

Miss Iehl
Broadcast Facilities
Files

QSP:JCP:ph/Lic:B

[29]

30

[29]

[Rec'd-FCC-Aug. 2, 1965]

FLY, SHUEBRUK, BLUME AND GAGUINE
30 Rockefeller Plaza
New York, New York
July 30, 1965

* * *

* * *

Re: Natick Broadcast Associates, Inc.
Natick, Massachusetts

Dear Mr. Waple:

Enclosed for filing, on behalf of Natick Broadcast Associates, Inc., are an original and nineteen copies of a Petition For Reconsideration of the Commission's July 2nd application returning, as unacceptable for filing an application by Petitioner for a standard broadcast station in Natick, Massachusetts. Enclosed also are all the copies of the application returned by the Commission. No filing fee is transmitted, because none is called for.

Please address any communications regarding the Petition For Reconsideration to the undersigned at 30 Rockefeller Plaza, New York, New York 10020.

Very truly yours,

/s/ Jerome S. Boros

Mr. Ben F. Waple
Federal Communications Commission
Washington, D. C. 20554

Enclosures

[30]

[Rec'd-FCC-Aug. 2, 1965]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Application of)	
Natick Broadcast Associates, Inc.	)	File No. BP
Natick, Massachusetts)	
For Construction Permit for)	
New Standard Broadcast Station)	

Petition For Reconsideration

Natick Broadcast Associates, Inc. (hereinafter referred to as "Associates"), by its attorneys, pursuant to Section 1.106 of the Commission's Rules, hereby requests the Commission to reconsider its action of July 2, 1965, returning its application as unacceptable for filing. In support hereof, Associates shows as follows.

1. On May 10, 1965, Associates tendered for filing an application for a new standard broadcast station at Natick, Massachusetts (1060 kc, 1 kw, D). The application, as tendered, was complete in all respects and was accompanied by the requisite filing fee. The application was tendered in sufficient time, in accordance with the requirements of the Commission's April 2, 1965 cut-off list (FCC 65-267, Mimeo 63244), to entitle it to be considered by the Commission together with the mutually exclusive application of Home Service Broadcasting Corporation (BP-16,476).

2. By letter of July 2, 1965, the Commission returned the application on the ground that it violated Section 73.37 of the

[31]

Commission's Rules. The Commission observed, in pertinent part:

"A preliminary examination of the application reveals that contrary to the showing contained therein, the proposed .005 mv/m

groundwave would overlap the 0.1 mv/m groundwave contour of Station KYW, Philadelphia, Pennsylvania 1060 kc, 50kw, DA-1 Unlimited time. Commission study indicates that the proposed 0.005 mv/m contour would extend a greater distance than indicated by the applicant [sic] studies . . ."

3. In view of the Commission's action, Associates reexamined the location of its proposed 0.005 mv/m contour. Field intensity measurements were made (Appendix 1) in order to determine precisely where the contour would fall. These measurements confirm that the KYW 0.1 mv/m and the proposed 0.005 mv/m groundwave contours would not overlap. The measurements thus establish that the application is in full conformity with Section 73.37 of the Commission's Rules.

4. The application, as originally tendered, accordingly is resubmitted herewith for filing (less the copy of the engineering exhibit previously retained by the Commission). The Commission should reconsider and reverse its determination of July 2, 1965 and accept the application for filing. ^{1/}

^{1/} Acceptance of the application for filing would entitle it to consideration with the mutually exclusive application of Home Service Broadcasting Corporation, since Associates application was timely tendered for filing and the instant retendering is without prejudice to, and does not derogate, from the May 10, 1965 tender of filing date. However, in the event there is any legal uncertainty about the tender date, the present retender should be treated nunc pro tunc i.e., as of May 10, 1965 so that there is no question, as to the application's conformity with Sections 1.571(c) and 1.580(c) of the Commission's Rules.

[32]

Respectfully submitted

NATICK BROADCAST ASSOCIATES,
INC.

By /s/ Jerome S. Boros
Fly, Shuebruk, Blume and Gaguine

* * *

July 30, 1965

Its Attorneys

[Rec'd-FCC-Aug. 2, 1965]

Appendix 1

ENGINEERING DATA
IN SUPPORT OF APPLICATION OF
NATICK BROADCAST ASSOCIATES, INC.
1060 KC 1.0 KW DAYTIME
NATICK, MASSACHUSETTS

TABLE OF CONTENTS
[Omitted]

LIST OF FIGURES

FIGURE NUMBER

1A	Radial Map & Key to Topographic Quadrangles
1B	Framingham (Mass.) Quadrangle
1C	Holliston (Mass.) Quadrangle
1D	Milford (Mass.) Quadrangle
1E	Grafton (Mass.) Quadrangle
1F	Uxbridge (Mass.) Quadrangle
1G	Oxford (Mass.) Quadrangle
1H	Thompson (Conn.) Quadrangle
1J	Putnam (Conn.) Quadrangle
1K	Danielson (Conn.) Quadrangle
2A	Field Intensity vs. Distance Graph WKOX 225° Radial Measured Points
2B	Field Intensity vs. Distance Graph WKOX 220° Radial Measured Points
2C	Field Intensity vs. Distance Graph WKOX 230° Radial Measured Points
2D	FCC Graph 20 (Family of Curves)
2E	Field Intensity vs. Distance Graph Computed for Proposed Natick Application Tabulation of Measured Points
5A	Revised 0.5, 2.0, 5.0 and 25 mv/m Service Contours
6A	Revised Daytime Allocation Study on FCC Map M-3
7A	Revised Daytime Allocation Study of Adjacent Channels
8A	Revised Daytime Allocation Study of Co-channel KYW

[36]

34

[36]

[Rec'd-FCC-Aug. 2, 1965]

[AFFIDAVIT]

Commonwealth of Massachusetts)
County of Worcester)

Norman L. Rivers, being first duly sworn on oath, deposes and says that: he is a Broadcast Consultant, employed by Barkley & Dexter Laboratories, Incorporated of Fitchburg, Massachusetts;

That he has on several previous occasions submitted data of an engineering nature to the Federal Communications Commission and that his qualifications are a matter of record in the files of that agency;

That the calculations, and exhibits in the attached report were made by him personally or under his direction, and that the field intensity measurements pertaining to this report were made by him personally;

That all facts contained therein are true of his own knowledge and belief, and that any statements made on information and assumption are believed by the affiant to be true.

/s/ Norman L. Rivers
Affiant

[JURAT the 27th day of July, 1965]

[37]

Rec'd-FCC-Aug. 2, 1965]

ENGINEERING DATA
IN SUPPORT OF APPLICATION OF
NATICK BROADCAST ASSOCIATES, INC.
1060 KC 1.0 KW DAYTIME
NATICK, MASSACHUSETTS

INTRODUCTION

This Engineering Exhibit has been prepared on behalf of Natick Broadcast Associates, Incorporated, in support of an application for a new Class II-D Standard Broadcast Station at Natick, Massachusetts, to operate Daytime only on 1060 kilocycles with one kilowatt of power and a non-directional antenna system.

By letter of July 2, 1965, the Commission notified the applicant that the application submitted on May 10, 1965 for filing was not acceptable because of overlap violative of Section 73.37 of the Rules.

This report submits field intensity measurements and resultant values demonstrating that there is no such prohibitive overlap.

Included also are apposite showings of area and population.

[38]

FIELD SURVEY

To determine the values of conductivity and inductivity along the path from the proposed site at Natick and KYW, measurements were made on WKOX - Framingham, Massachusetts, operating on 1190 kilocycles with 1 kilowatt, along the radial 225° true. Additional measurements were made at azimuths of 220° and 230° to substantiate the values determined on the main radial. The WKOX transmitter is located four miles Northwest of the proposed Natick site, and the radials examined lie essentially on the 232.5° azimuth in question, as shown in Figure 1A.

Figures 2A, 2B and 2C show the measured points versus distance and calculated conductivity and inductivity values. A tabulation of the measurement points on each radial follows the graphs.

The radials used, showing the location of each point, are included as Figures 1B through 1K.

Field intensity measurements were made in accordance with the procedures specified in the Commission's Rules, by Norman L. Rivers using a Nems-Clarke 120-D Field Intensity Meter, Serial No. 429, last calibrated by the manufacturer on 19 February 1962. The correction factor for 1190 kilocycles was found to be 1.000, and linearity did not deviate more than 3% from midscale reference. Attenuators were adjusted to be correct within 2%.

[39]

METHOD OF DETERMINING CONDUCTIVITY & INDUCTIVITY VALUES

From the graphs, Figures 2A, 2B and 2C, it is apparent that there is a poor correlation with Graph 15 of Section 73.184 computed for an inductivity of 15. The values appearing on these Figures, therefore, were calculated by using Graph 20 as outlined in Section 73.184(d) for another value of dielectric constant.

By comparing the measure points on Figure 2A with the curves on Graph 20, it appears that the best fit is with the 15 degree curve, resulting in the following computation of values:

Given (from Graph 20): Radiation = 190 MV/M @ 1 mile
b = 15°
p = 1.16
f = 1.19 Mc.

SOLVE FOR: ϵ & σ

$$X \approx \frac{\pi}{P} \cdot \frac{R}{\lambda} \cdot \cos b$$

$$X \approx \frac{3.1416}{1.16} \cdot 6.42 \cdot 0.96593$$

$$X \approx 16.855$$

$$\epsilon \approx X \tan b - 1$$

$$\epsilon \approx (16.855 \cdot 0.26795) - 1$$

$$\epsilon \approx 3.52$$

$$\sigma_{\text{e.m.u.}} = \frac{X f m c}{17.9731} \cdot 10^{-14}$$

$$\sigma_{\text{e.m.u.}} = \frac{(16.855 \cdot 1.19)}{17.9731} \cdot 10^{-14}$$

$$\sigma_{\text{e.m.u.}} = 1.11 \text{ mmho/m}$$

[40]

In accordance with procedures set forth in Section 73.184 of the Commissions Rules, the calculated values of conductivity and inductivity were corrected for frequency and radiation to coincide with the requested facilities of 1060 kilocycles and radiation of 237 mv/m at one mile. These are plotted on the field intensity versus distance graph labeled Figure 2E.

DETERMINATION OF CONTOURS

The revised Natick proposed contours along azimuths 215 degrees true to 235 degrees true were computed from Figure 2E for a distance of 40 miles, from which point the equivalent distance method was employed using conductivity values from FCC Map M3.

Considering the nature of the paths to either side of those measured, it would be expected to be similar in transmission characteristics to the measured paths, but in the absence of more specific data, use has been made of FCC Map M3 values.

Included in this report are revised Map M-3 (Figure 6A), detailed adjacent channel study (Figure 7A), detailed interference study on KYW

(Figure 8A), and revised service contours for the proposed Natick assignment (Figure 5A).

All exhibits included in this report are based on a radiation of 237 mv/m at one mile for the proposed Natick assignment, and using the measured conductivity and inductivity values (From Figure 2E) for azimuths from 215 degrees true to 235 degrees true.

For all other azimuths, use was made of FCC Map M-3 conductivity values.

[41]

POPULATION AND SERVICE AREA

The figures of Table II (Exhibit E-1) showing proposed population and area within given service contours are affected slightly when the measured conductivity values are used to determine contour distance. The modified figures are included in this report as Revised Table II.

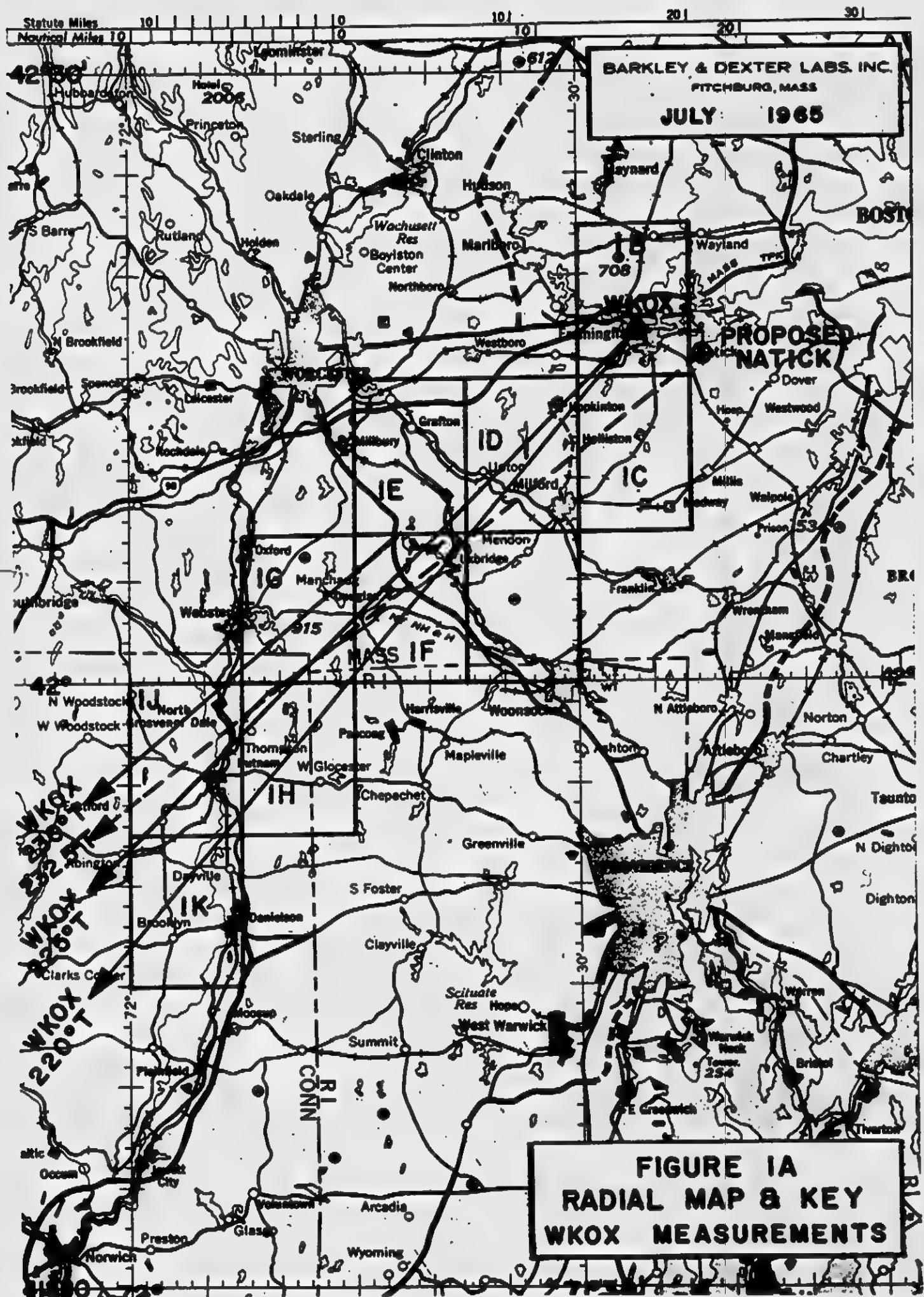
REVISED TABLE II

AREA AND POPULATION DATA

<u>CONTOUR (mv/m)</u>	<u>POPULATION</u>	<u>AREA (SQ. MILES)</u>
1000	Less than 300	.13
25	39,555	36.27
5	193,748	200
2	253,251	370
0.5	452,186	1162

CONCLUSIONS

It is apparent from the exhibits labeled Figure 6A and Figure 8A that there is adequate separation between the proposed Natick .005 mv/m contour and the KYW 0.1 mv/m contour to ensure no overlap and no proposed interference to KYW as required by Section 73.37 of the Rules.





UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

STATE OF MASSACHUSETTS
DEPARTMENT OF PUBLIC WORKS

HOLLISTON QUADRANGLE
MASSACHUSETTS
1:25,000 SERIES TOPOGRAPHIC



Revised, corrected, and published by the Geological Survey
under authority of the Secretary of the Interior
under authority of the Secretary of the Interior
under authority of the Secretary of the Interior

Topographic Survey - 1:25,000 scale
under authority of the Secretary of the Interior
under authority of the Secretary of the Interior
under authority of the Secretary of the Interior



SCALE 1:25,000
1 inch = 2,500 feet
1 centimeter = 25 meters

COPYRIGHT OFFICIAL, SO FORTH
COPYRIGHT OFFICIAL, SO FORTH



Legend
Topography
Roads
Railroads
Water
Settlements

HOLLISTON, MASS
1:25,000 SERIES TOPOGRAPHIC

FIGURE 1C

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

STATE OF MASSACHUSETTS
DEPARTMENT OF PUBLIC WORKS

MILFORD QUADRANGLE
MASSACHUSETTS
7.5 MINUTE SERIES (TOPOGRAPHIC)

[illegible]

SCALE: 1-10000

Copyright © 1999 by John Wiley & Sons, Inc.

FOR SALE BY THE U.S. GOVERNMENT THROUGH THE NATIONAL BUREAU OF INVESTIGATION, WASHINGTON, D.C.

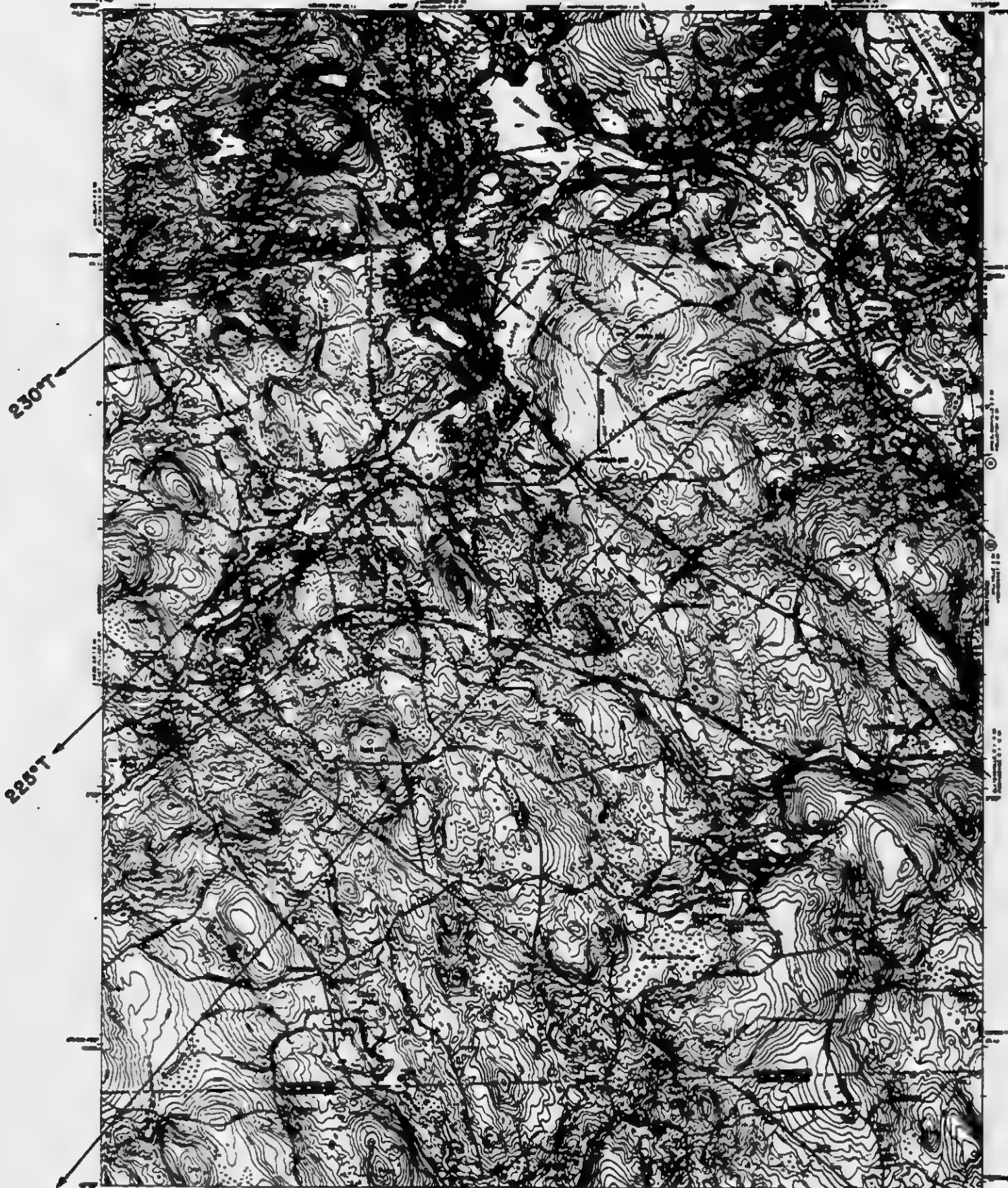
MILPOWER, INC.
1-800-5-45-2521

FIGURE 1D

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

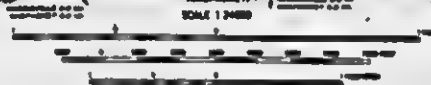
STATE OF MASSACHUSETTS
DEPARTMENT OF PUBLIC WORKS

UTERIDGE QUADRANGLE
MASSACHUSETTS-WOODS HOLE
TOPOGRAIC SERIES (TOPOGRAPHIC)



Prepared, edited, and published by the Geological Survey
based on U.S.G.S. 7.5-minute, 1:25,000-scale maps
topography to elevation 1000-2000. Section lines
prepared by the U.S.G.S. 7.5-minute topographic
series. Contour lines are at 20-foot intervals
and these were corrected to 100-foot intervals.

1000-foot contour lines are shown as solid lines,
and 20-foot contours as dashed lines.



UTERIDGE, MASS.-W. 1
1:25,000-scale topographic map



UTERIDGE, MASS.-W. 1
1:25,000-scale topographic map

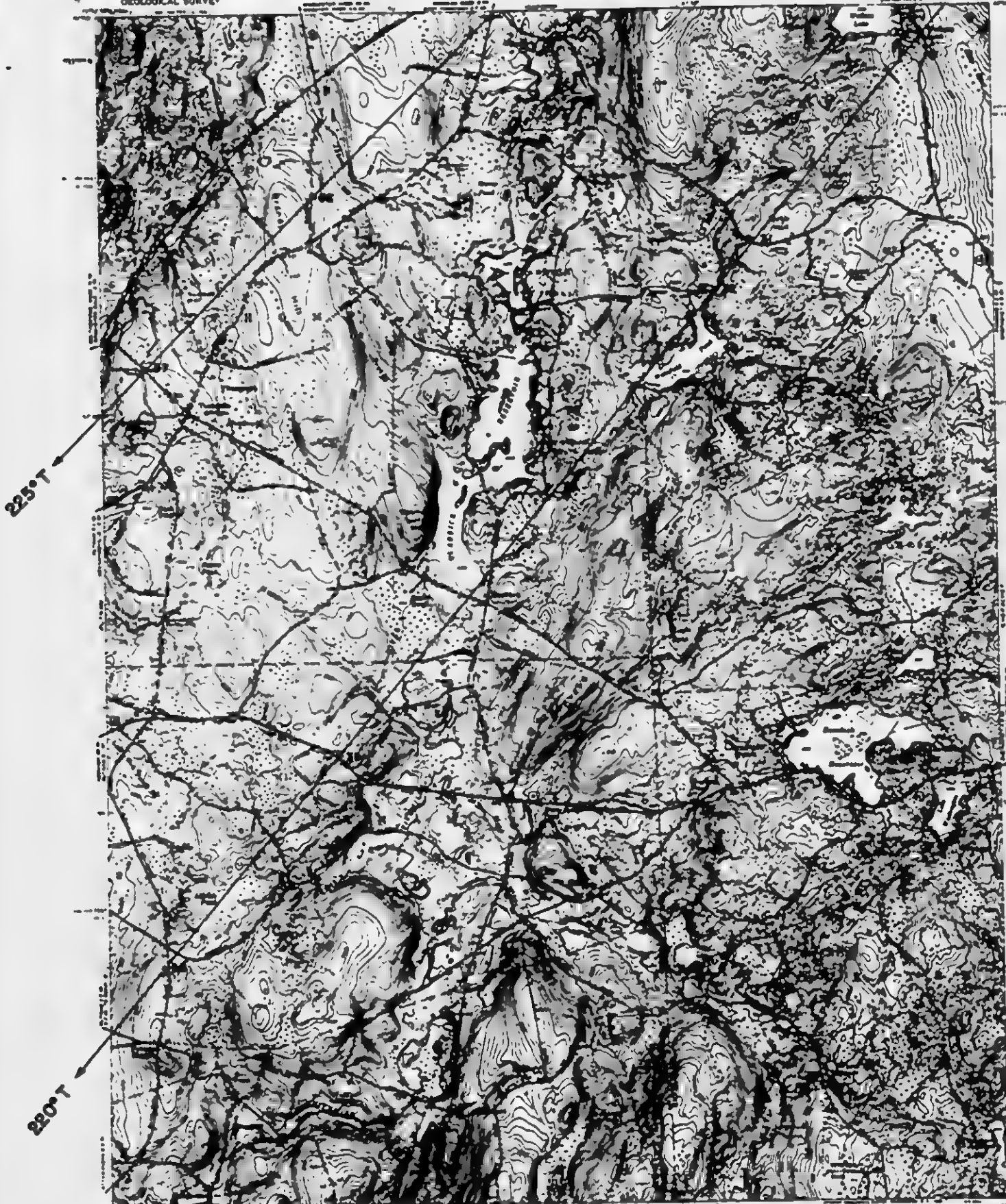
UTERIDGE, MASS.-W. 1
1:25,000-scale topographic map

FIGURE 1 F



UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

THOMPSON QUADRANGLE
CONNECTICUT - RHODE ISLAND
7.5 MINUTE SERIES (TOPOGRAPHIC)



Map showing topographic features and boundaries of the Thompson Survey. The map is oriented with North at the top. The survey area is bounded by the Connecticut River to the north and the Rhode Island border to the south. The map shows a complex network of roads and a dense pattern of contour lines indicating elevation changes. A large body of water is visible in the upper central part of the map.

Scale 1:50,000
Vertical datum, 1929
Horizontal datum, 1929

Legend
Symbol for road
Symbol for contour line
Symbol for spot elevation

THOMPSON, CONN.-R.I.
7.5 MINUTE SERIES

FIGURE 1 H

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

PUTNAM QUADRANGLE
CONNECTICUT - WINDHAM CO
7.5 MINUTE SERIES (TOPOGRAPHIC)



230-T

220-T

Regions added and removed by the Geological Survey
Center to USGS, 1955 and Connecticut State Survey
Topography to 1955, 1962, 1965, 1968, 1970
Plan - 1:24,000, 100' contour interval
Elevation - 100' contour interval
Map - 1:24,000, 100' contour interval
Scale - 1:24,000, 100' contour interval
Map - 1:24,000, 100' contour interval
Scale - 1:24,000, 100' contour interval

SCALE 1:24,000

CONTINUED 1973, 1975, 1977
actual to 1973, 1975, 1977

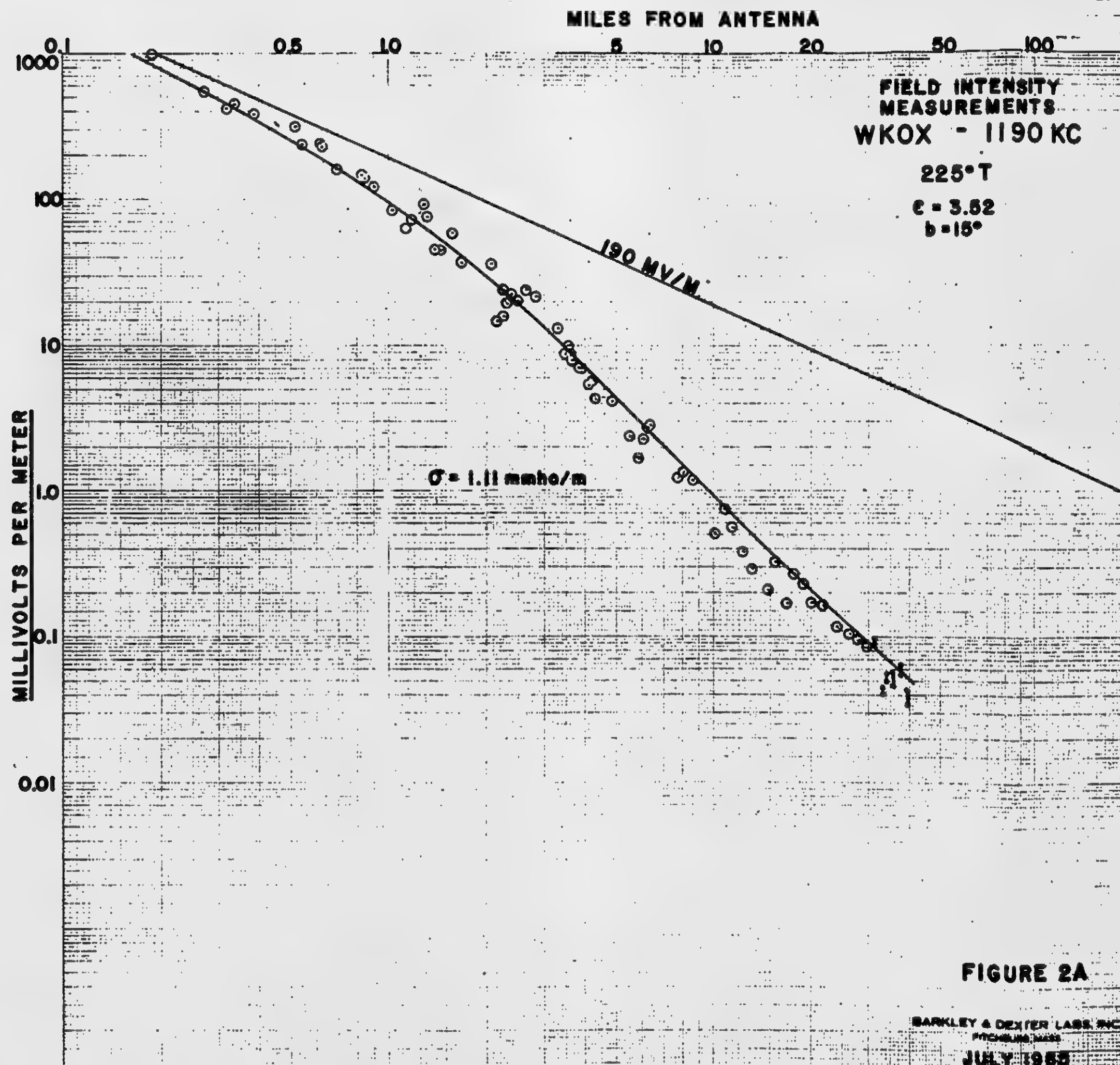
ROAD CLASSIFICATION

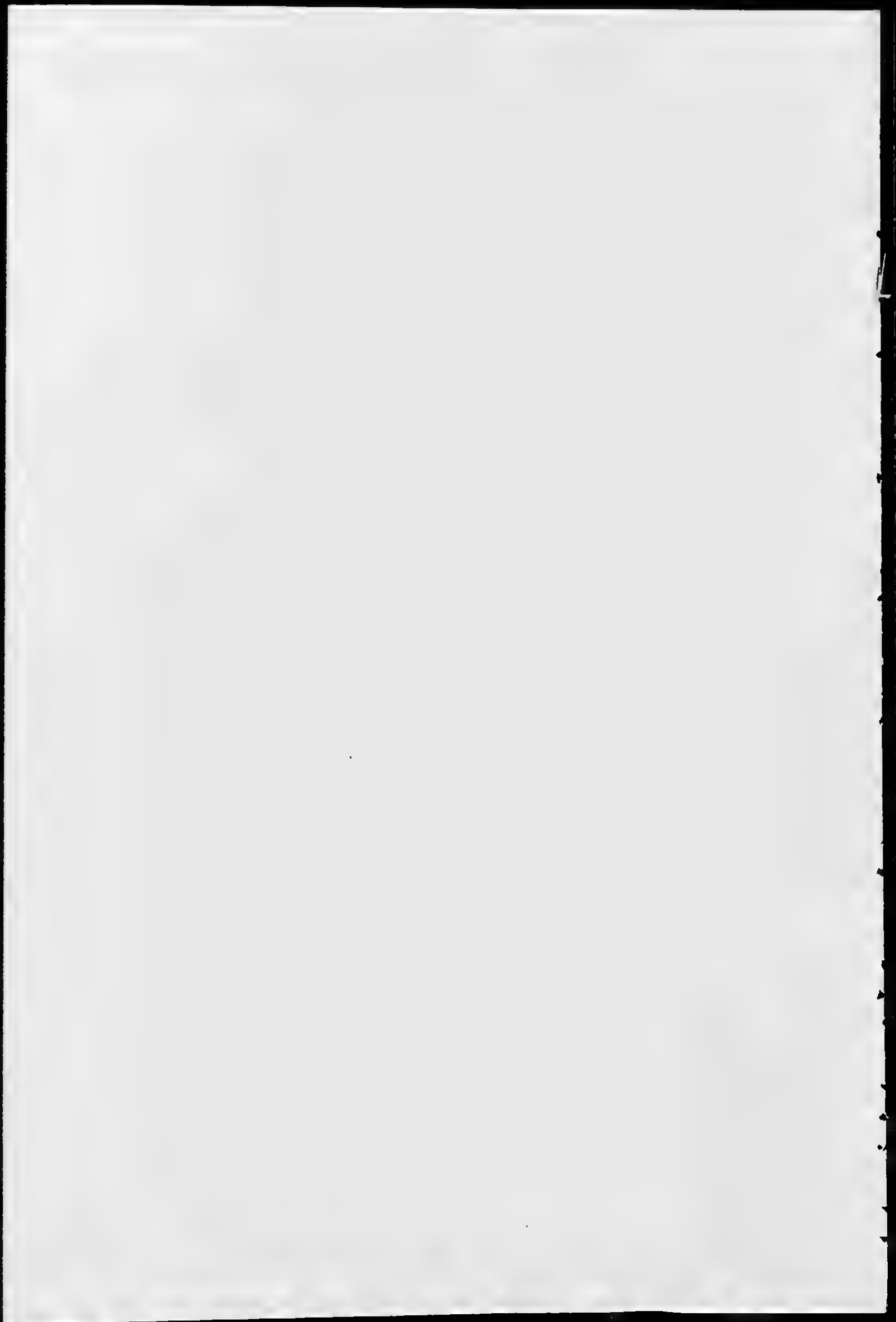
PUTNAM CONN
SECTION 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

This map complies with National Map Accuracy Standards
FOR SALE BY U.S. GEOLOGICAL SURVEY WASHINGTON 25 D.C.
A 100,000 scale map of the Putnam Quadrangle, Connecticut, showing topography, roads, and other features.

FIGURE 1J







MILES FROM ANTENNA

5

10

20

50

100

FIELD INTENSITY
MEASUREMENTS
WKOX - 1190 KC220° T
STUB RADIAL $\epsilon = 3.52$ $b = 15^\circ$

190 MV/M

 $\sigma = 1.11 \text{ mmho/m}$

FIGURE 2B

JULY 1965

BARKLEY & DEXTER LABS. INC.

PITTSBURGH, PENN.

MILES FROM ANTENNA

MILES FROM ANTENNA

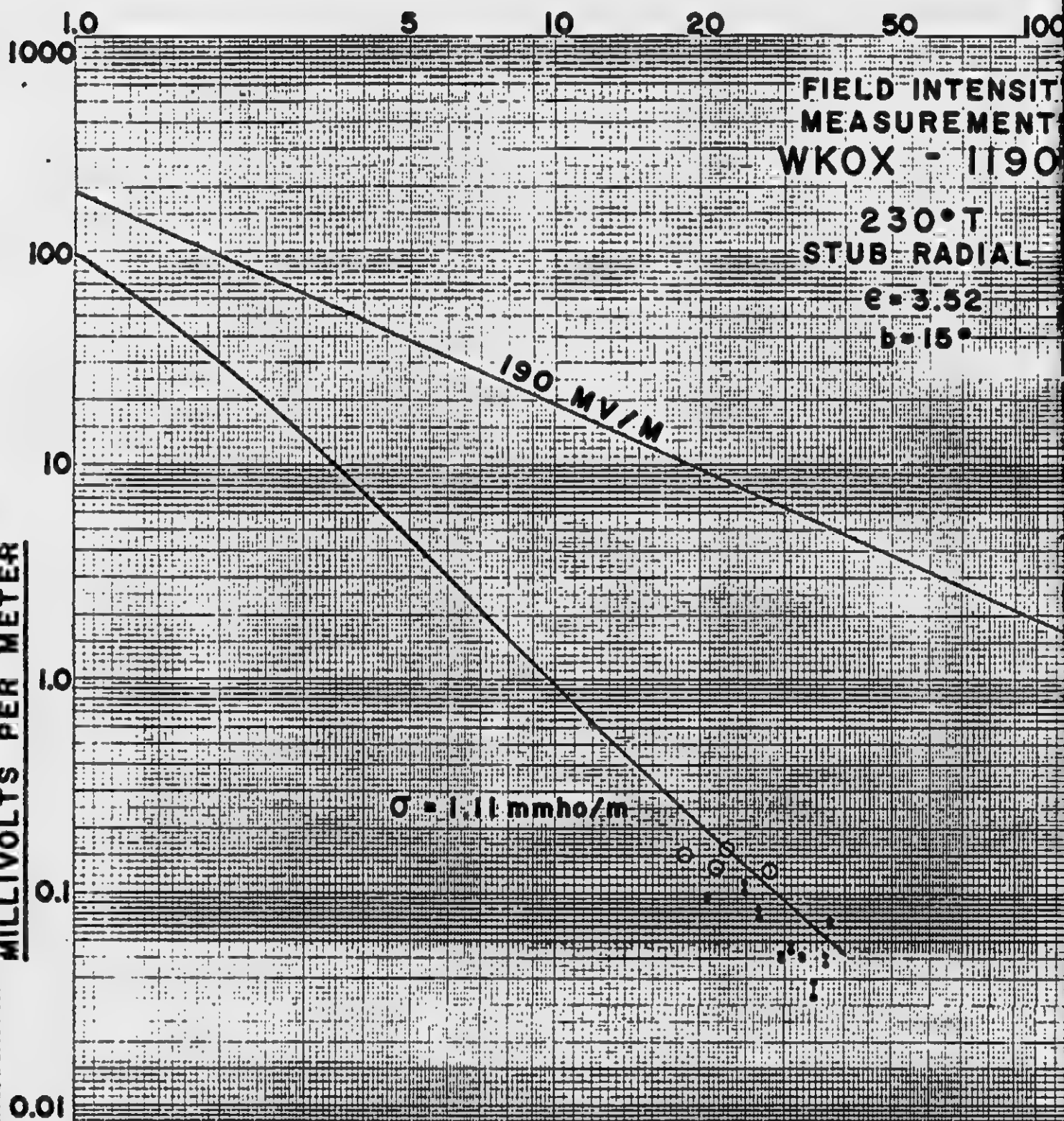
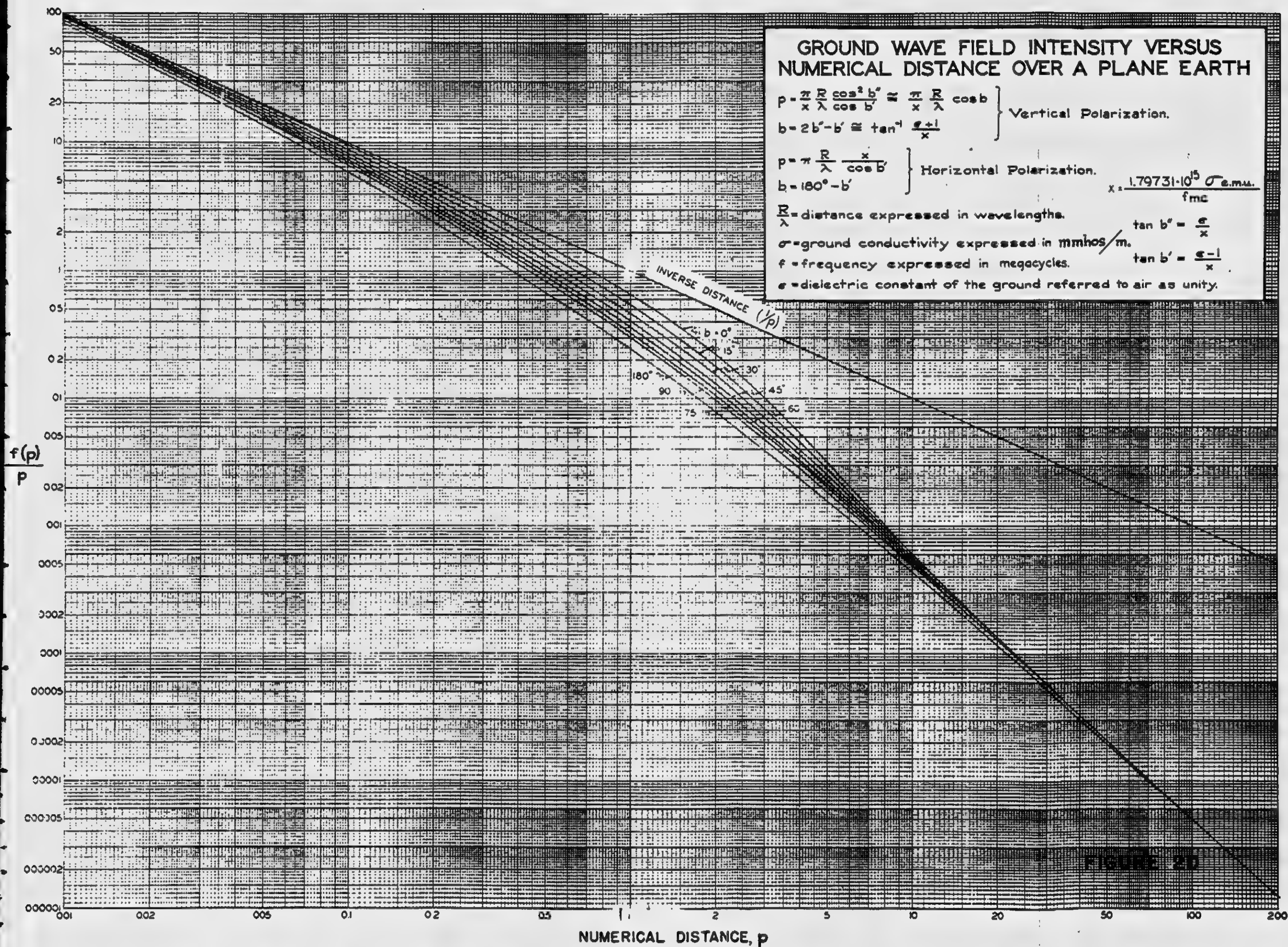


FIGURE 2

JULY 1965

DARKLEY-LOCATED





K&E LOGARITHMIC 40 7802
7 X 2.2 CYCLES
MADE IN U.S.A.
RUFFEL & ROSEN CO.

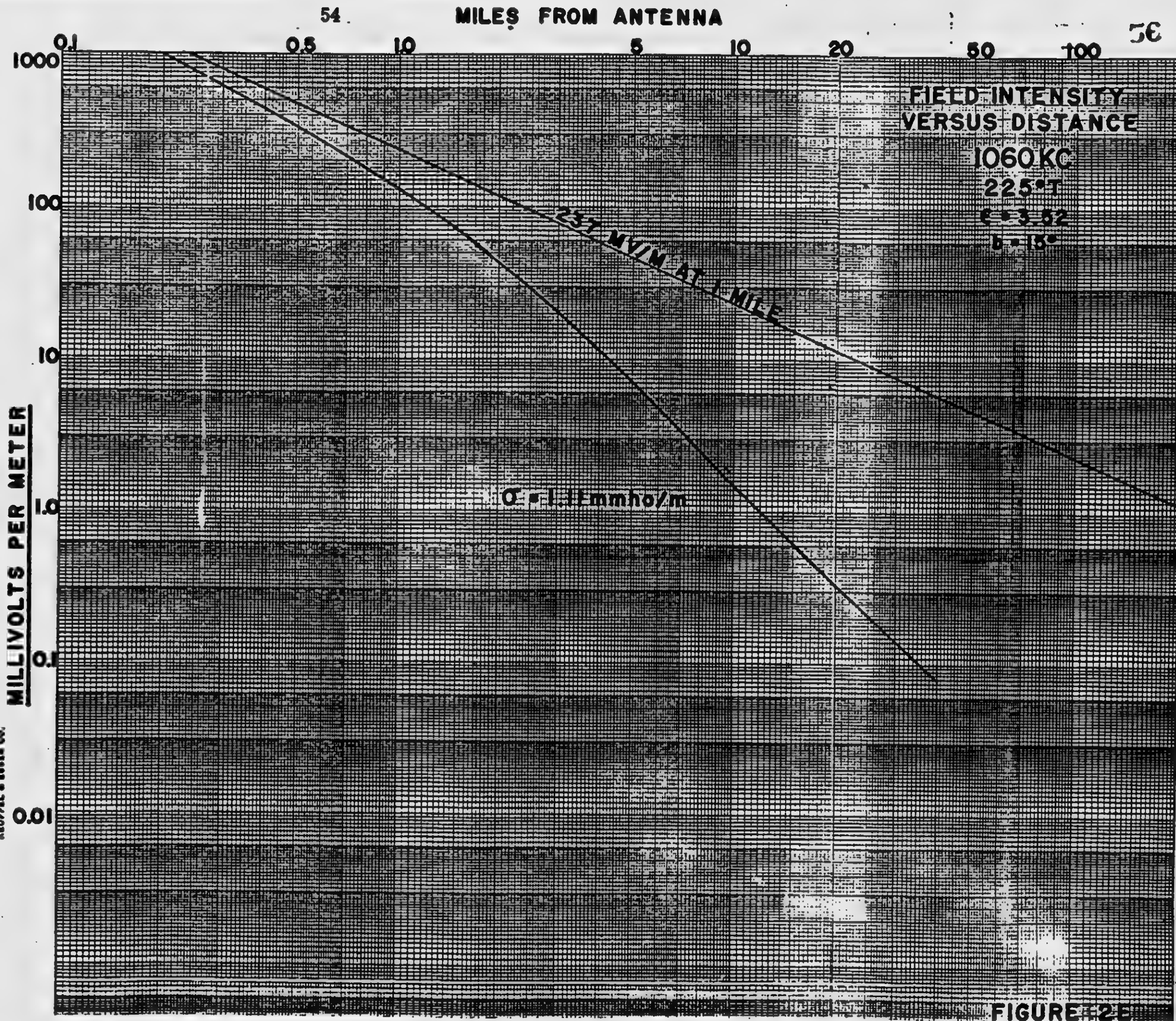
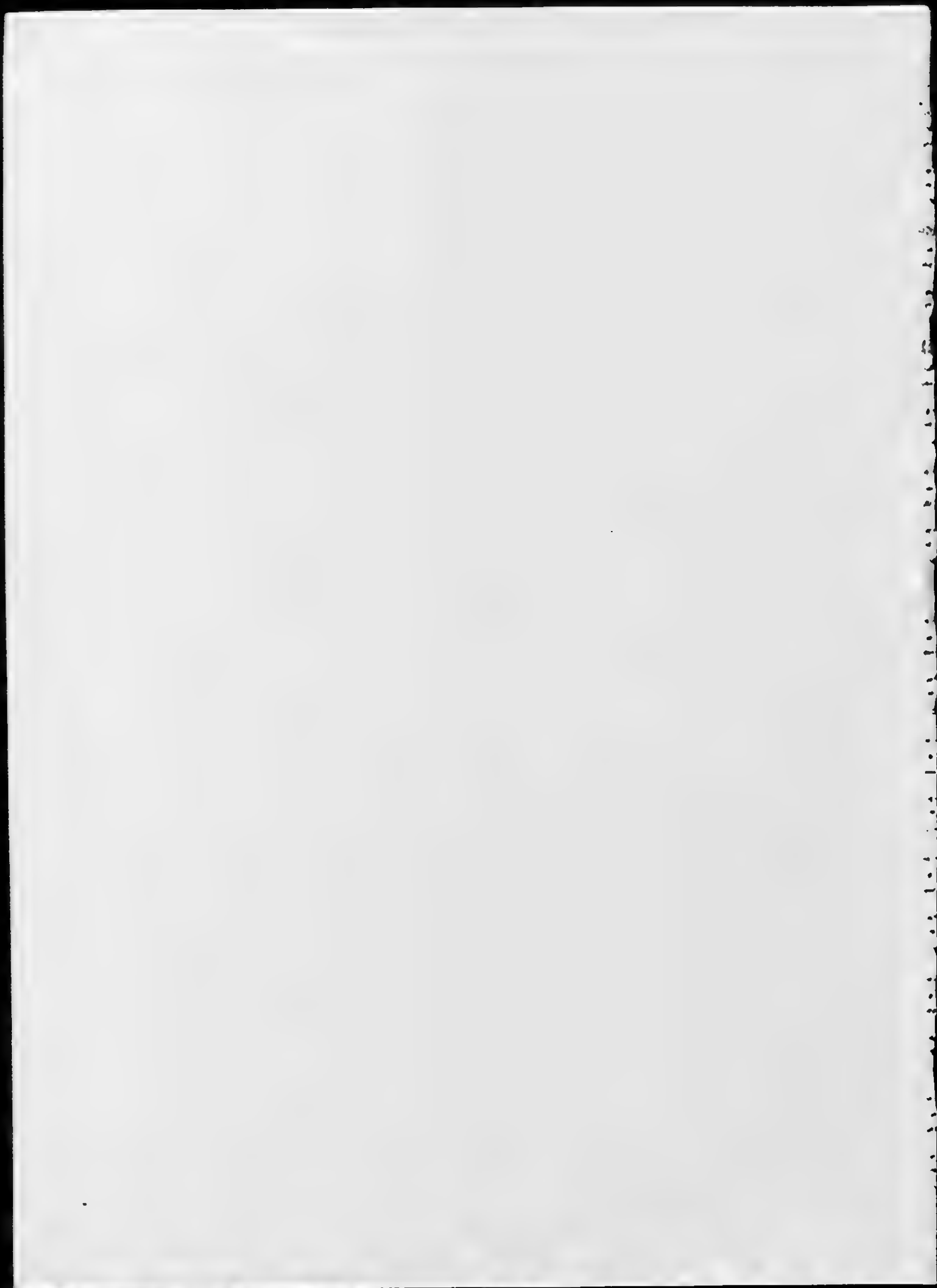


FIGURE 2E



FIELD INTENSITY MEASUREMENTS
 WKOX 1190 KC. 1.0 KW.
 RADIAL 225° T.

<u>Point</u>	<u>E(mv/m)</u>	<u>Distance (Miles)</u>	<u>Date</u>	<u>Point</u>	<u>E(mv/m)</u>	<u>Distance (Miles)</u>	<u>Date</u>
1	1005	.19	7/15/65	21	58.5	1.59	7/17/65
2	560	.273	"	22	37.2	1.69	"
3	420	.32	"	23	36.2	2.10	7/16/65
4	448	.34	"	24	14.8	2.18	"
5	390	.39	"	25	24.4	2.29	"
6	322	.527	"	26	15.8	2.295	"
7	240	.55	"	27	19.6	2.335	"
8	248	.622	"	28	22.7	2.42	"
9	232	.63	7/17/65	29	20.5	2.515	"
10	160	.705	"	30	24.5	2.68	"
11	146	.84	"	31	22.1	2.89	"
12	140	.855	"	32	13.2	3.38	"
13	122	.92	"	33	8.7	3.56	"
14	85	1.04	"	34	10.0	3.63	"
15	63.2	1.14	"	35	8.62	3.725	"
16	73.0	1.19	"	36	8.0	3.73	"
17	93.5	1.305	"	37	7.22	3.90	"
18	77	1.345	"	38	7.15	4.0	"
19	45.5	1.40	"	39	5.42	4.16	"
20	45	1.468	"	40	5.80	4.32	"

FIELD INTENSITY MEASUREMENTS
 WKOX 1190 KC. 1.0 KW.
 RADIAL 225° T. (Cont'd.)

<u>Point</u>	<u>E(mv/m)</u>	<u>Distance (Miles)</u>	<u>Date</u>	<u>Point</u>	<u>E(mv/m)</u>	<u>Distance (Miles)</u>	<u>Date</u>
41	4.38	4.425	7/16/65	57	.332	15.97	7/16/65
42	4.15	4.955	"	58	.172	17.08	"
43	2.40	5.625	"	59	.275	18.17	7/15/65
44	1.68	5.98	"	60	.232	19.12	"
45	2.28	6.17	"	61	.173	20.17	"
46	2.75	6.40	"	62	.163	21.93	"
47	2.83	6.49	"	63	.118	24.06	"
48	1.25	7.94	"	64	.105	26.19	"
49	1.35	8.21	"	65	.094/.098	28.04	"
50	1.21	8.85	"	66	.083/.088	29.98	"
51	.51	10.26	"	67	.088/.098	31.70	7/16/65
52	.75	11.12	"	68	.041/.045	33.07	"
53	.56	11.60	"	69	.050/.058	34.17	"
54	.398	12.53	"	70	.046/.058	35.82	"
55	.292	13.38	"	71	.056/.065	37.68	"
56	.210	15.00	"	72	.035/.045	39.46	"

FIELD INTENSITY MEASUREMENTS
WKOX 1190 KC. 1.0 KW.
RADIAL 220° T.

<u>Point</u>	<u>E(mv/m)</u>	<u>Distance (Miles)</u>	<u>Date</u>	<u>Point</u>	<u>E(mv/m)</u>	<u>Distance (Miles)</u>	<u>Date</u>
1	85.0	1.04	7/15/65	22	0.46	12.48	7/13/65
2	73.0	1.19	"	23	0.34	14.46	"
3	77.0	1.345	"	24	0.26	15.89	"
4	45.0	1.468	"	25	0.258	17.52	"
5	58.5	1.59	7/13/65	26	0.18	19.77	"
6	36.2	2.10	"	27	0.13	22.0	"
7	24.4	2.29	"	28	0.13	23.36	"
8	28.2	2.56	"	29	0.11	23.96	"
9	22.1	2.89	"	30	0.093	25.6	"
10	13.2	3.38	"	31	.094/.096	28.11	7/15/65
11	8.0	3.73	"	32	.055/.057	28.55	"
12	7.8	4.34	"	33	.082/.086	30.40	"
13	6.35	4.73	"	34	.066/.070	32.35	"
14	3.82	5.52	"	35	.061/.063	32.86	"
15	3.12	6.0	"	36	.062/.066	34.85	"
16	2.8	6.65	"	37	.036/.038	36.49	"
17	1.38	8.04	"	38	.052/.056	37.84	"
18	1.2	8.66	"	39	.056/.060	40.06	"
19	0.93	9.58	"	40	.048/.052	41.92	"
20	0.57	10.62	"	41	.027/.033	44.08	"
21	0.58	11.66	"	42	.028/.033	45.16	"

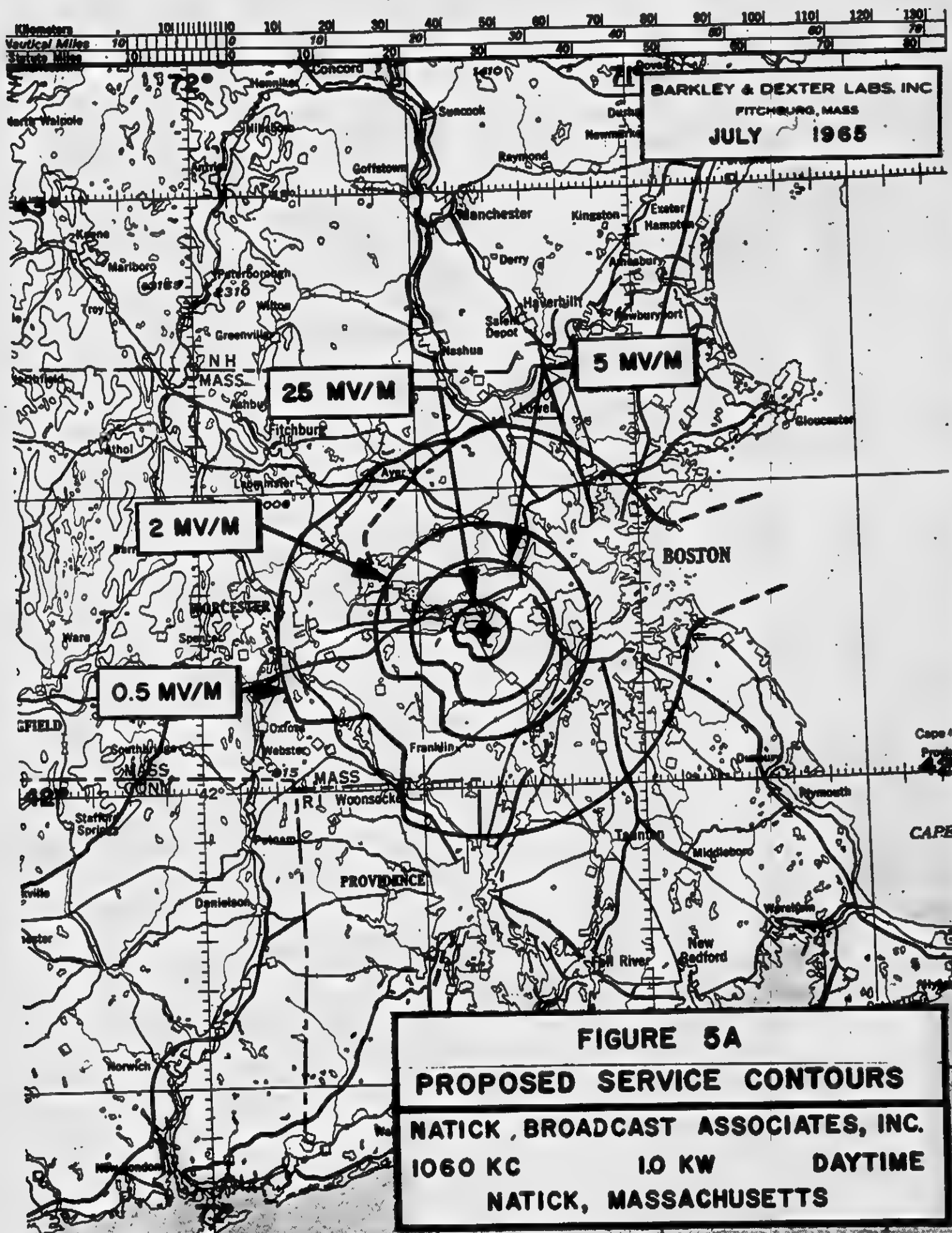
[60]

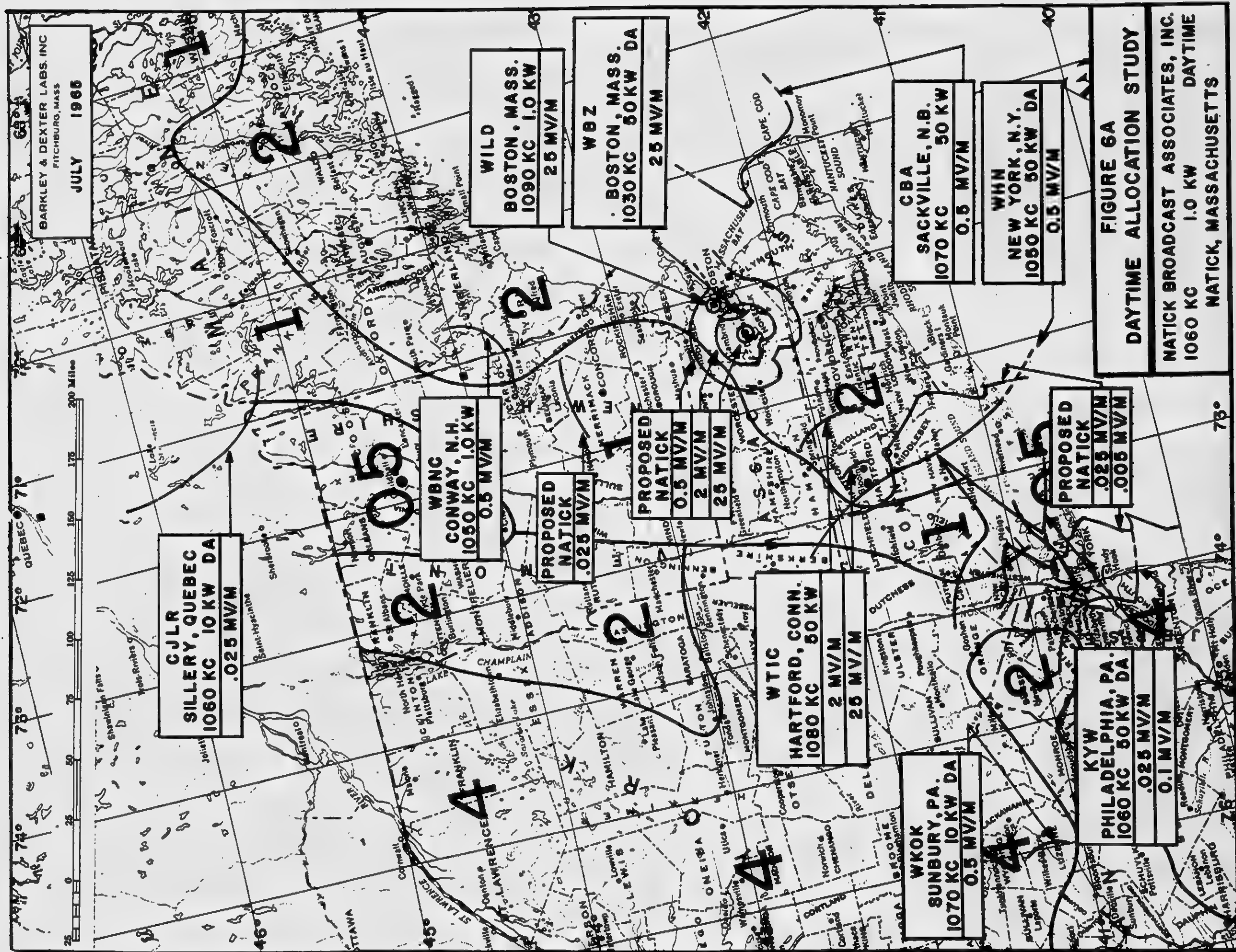
58

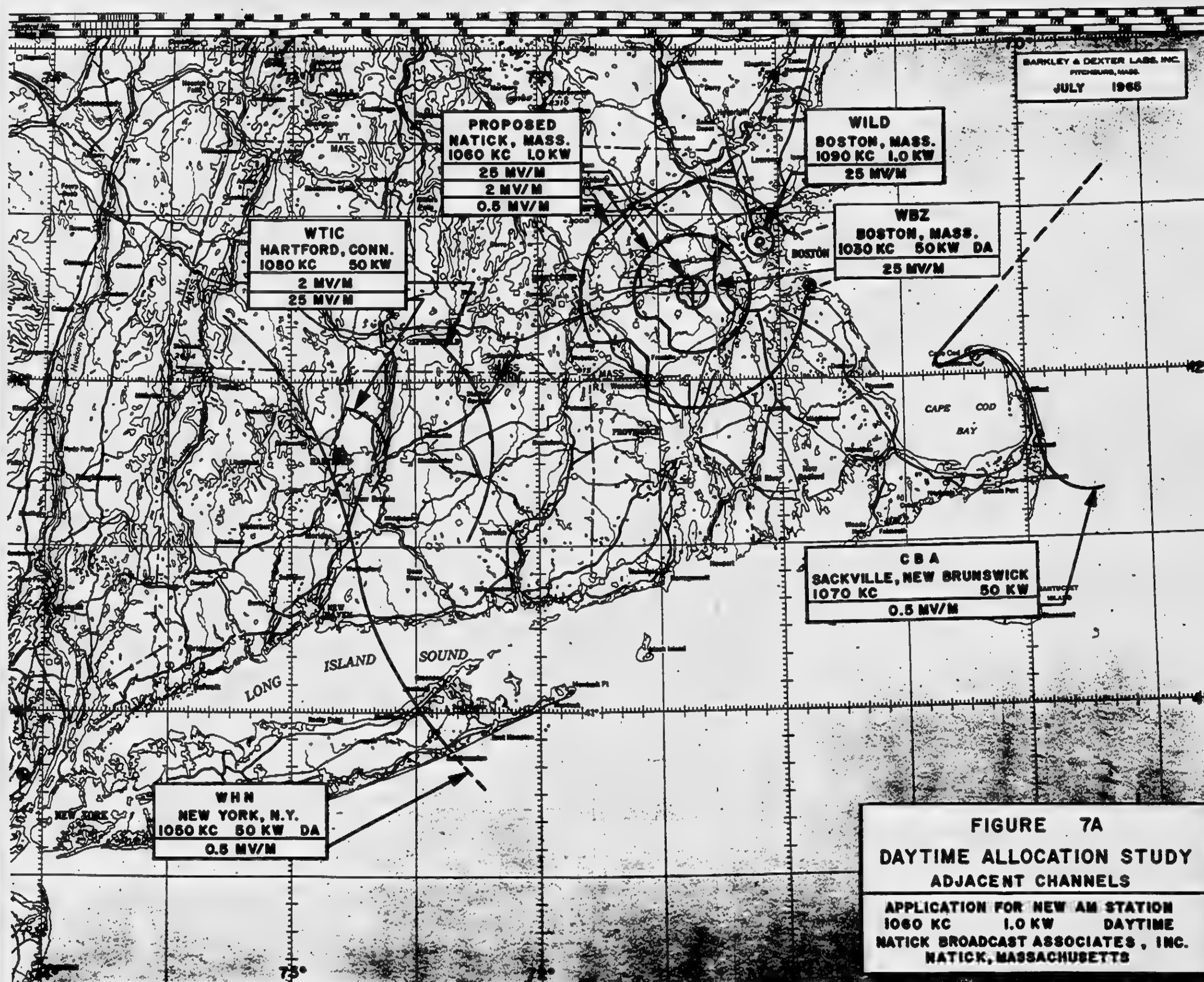
[60]

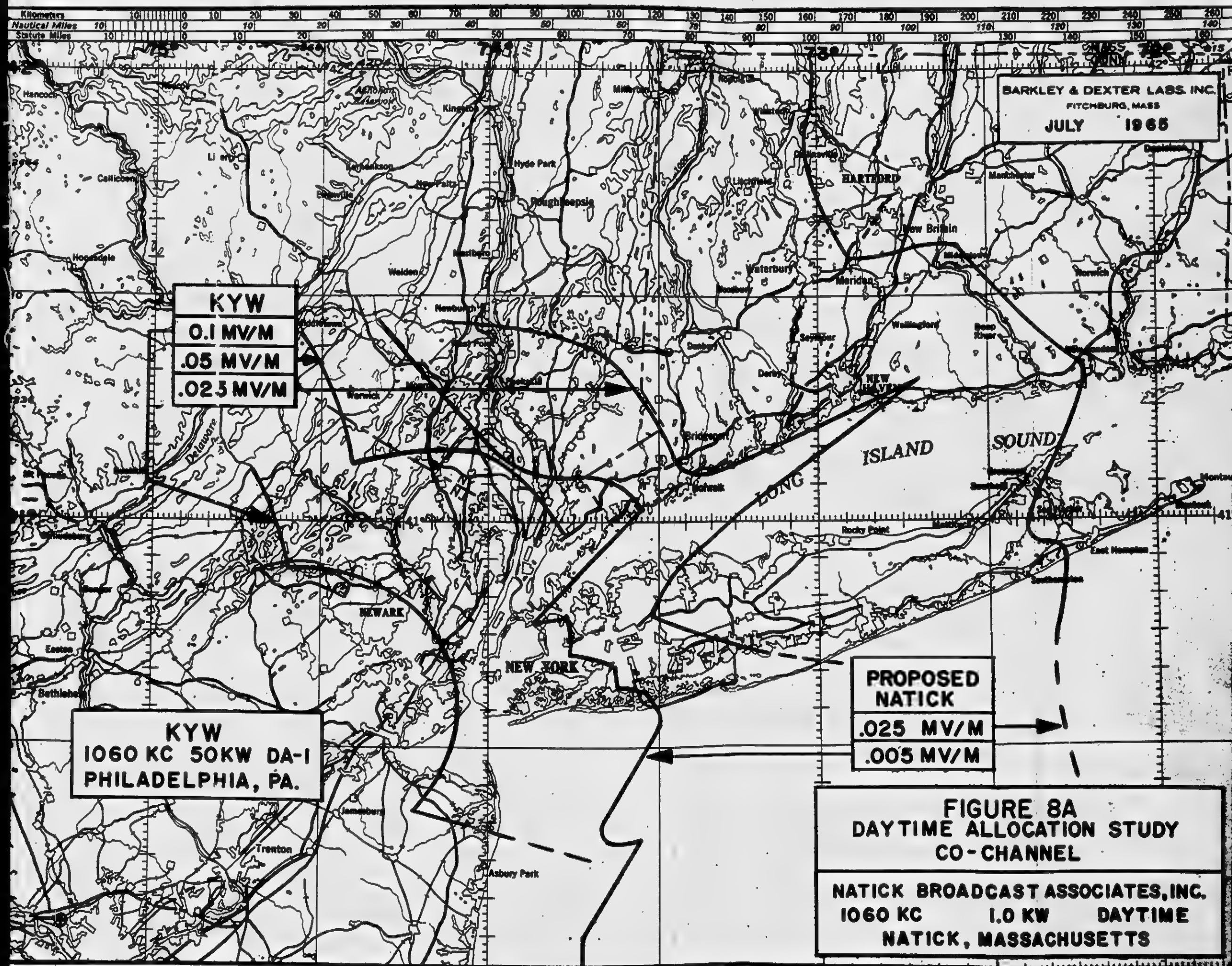
FIELD INTENSITY MEASUREMENTS
WKOX 1190 KC 1.0 KW
RADIAL 230° T.

<u>POINT</u>	<u>E(MV/M)</u>	<u>DISTANCE (MILES)</u>	<u>DATE</u>
1	0.15	18.71	7/16/65
2	.092/.096	20.81	"
3	0.13	21.68	"
4	0.16	22.78	"
5	.098/0.11	24.80	"
6	.076/.082	26.54	"
7	0.125	28.00	"
8	.048/.051	29.82	"
9	.054/.058	31.22	"
10	.049/.051	32.77	"
11	.032/.038	34.95	"
12	.047/.051	36.43	"
13	.071/.075	37.58	"











[65]

[Rec'd-FCC-Sep. 10, 1965]

LANGAN, DEMPSEY & MURPHY
ATTORNEYS AT LAW
41 TREMONT STREET

* * *

810 BOSTON BUILDING
BOSTON, MASSACHUSETTS 02108

September 9, 1965

Mr. Ben F. Waple
Federal Communications Commission
Washington, D.C. 20554

Re: Natick Broadcast Associates, Inc.

Dear Mr. Waple:

Enclosed please find Twenty-two (22) copies of Opposition to
Petition of Natick Broadcast Associates, Inc. for Reconsideration
by the Home Service Broadcasting Corporation.

There is also attached hereto an Affidavit of Service.

Very truly yours,

Home Service Broadcasting
Corporation

By: /s/ Langan, Dempsey &
Murphy
James M. Langan

jml:ea

Enclosures (22)

[66]

[AFFIDAVIT OF SERVICE]

Now comes James M. Langan, Attorney for Home Service Broadcasting Corporation, and certifies that he served a copy of the opposition of Home Service Broadcasting Corporation to the Petition of Natick Broadcast Associates, Inc. for reconsideration of the Commission's decision, returning as unacceptable for filing the application of the petitioner, Natick Broadcast Associates, Inc.

Said service was made by mailing a copy of said Petition by registered mail to Natick Broadcast Associates, Inc. c/o Edward F. Perry, Jr. at the official office of the Corporation, 203 Pond Street, Natick, Massachusetts.

/s/ James M. Langan

[67]

[Received FCC September 10, 1965]

Opposition to Petition of Natick Broadcast Associates, Inc., for
Reconsideration

Home Service Broadcasting Corporation by its attorney hereby requests the Commission for leave to file opposition to the petition of Natick Broadcast Associates, Inc. to have the Commission reconsider its action of returning the application of Natick Broadcast Associates, Inc. as unacceptable for filing.

Opposition of Home Service Broadcasting Corporation to the
Petition of Natick Broadcast Associates, Inc., for Reconsideration

Home Service Broadcasting Corporation originally filed an application for a broadcasting permit, file number BP 16, 478 and such application was accepted by the Commission and is presently pending.

Natick Broadcast Associates, Inc. thereafter filed an application for a broadcasting permit. The Commission rejected said application as unacceptable. The Natick Broadcast Associates, Inc. through its attorney then petitioned the Commission to reconsider its action of July 2, 1965 returning the application as unacceptable for filing. The Natick Broadcast Associates, Inc. then filed said Petition under section 1.106 of the Commission's Rules.

Home Service Broadcasting Corporation sets forth its opposition to the petition of Natick Broadcast Associates, Inc. and requests that said petition be dismissed.

[68]

1. The application as filed was unacceptable to the Commission and the application as filed remains unchanged.
2. All the information, data and measurements which the Petitioners seek to present to the Commission in the Petition for Reconsideration were available prior to and at the time of their filing.

3. The finding of the Commission that the application of Natick Broadcast Associates, Inc. was unacceptable was based on the material, measurements and reports made by Natick Broadcast Associates, Inc.
4. The conductivity measurement should have been filed with the original application, and the Natick Broadcast Associates, Inc. should not be allowed now to file this information.
5. The cut-off date, May 15, 1965, has passed.
6. The date within which they could have been allowed to file any amendments had expired prior to the time of their filing.
7. Natick Broadcast Associates, Inc. has not complied with the requirements of Section 1.106 and its sub-sections and all other pertinent sections of the Commission's Rules.
8. The Petitioners have not presented any basis for the Commission to reverse its rule that the application as it was filed was unacceptable and the application as filed remains unacceptable.
9. To consider any amended application or any changed application, nunc pro tunc, would make all the rules of the Commission a nullity and allow by such process amendments and changes which would vary and alter the original application.

[69]

Respectfully submitted

HOME SERVICE BROADCASTING CORPORATION

BY: /s/ Langan, Dempsey & Murphy

* * *

It's attorneys

September 7, 1965

FLY, SHUEBRUK, BLUME AND GAGUINE

JAMES LAWRENCE FLY
COUNSELNew York, New York
September 21, 1965PETER SHUEBRUK
JACK P. BLUME
BENITO GAGUINE
JEROME S. BOROS
HERBERT M. SCHULKIND
JOSEPH J. KESSLER
DONALD E. WARD
T. RICHARD KENNEDYRe: Natick Broadcast Associates, Inc.
Natick, MassachusettsROCKEFELLER PLAZA
NEW YORK, NEW YORK 10020
CIRCLE 7-30401212 K STREET, N. W.
WASHINGTON, D. C. 20006
METROPOLITAN 8-6100

Dear Mr. Waple

Enclosed for filing, on behalf of Natick Broadcast Associates, Inc., applicant for a new standard broadcast station in Natick, Massachusetts, are an original and nineteen copies of a Reply to the Opposition to Petition of Natick Broadcast Associates, Inc. for Reconsideration filed herein by Home Service Broadcasting Corporation.

Please refer a copy of any communications with respect to this matter to the undersigned at 30 Rockefeller Plaza, New York, New York 10020.

Very truly yours

Jerome S. Boros
Jerome S. Boros

Mr. Ben F. Waple
Federal Communications Commission
Washington, D. C. 20554

Enclosures (20)

Miss Lee



[71]

[Received September 23, 1965]

REPLY

Natick Broadcast Associates, Inc. (hereinafter referred to as "Associates"), by its attorneys, replies to the Opposition to Petition of Natick Broadcast Associates, Inc. for Reconsideration (hereinafter referred to as "Opposition") filed by Home Service Broadcasting Corporation (hereinafter referred to as "Corporation").

1. The Opposition seeks to gain private advantage for Corporation at public expense. For the Commission traditionally and consistently had held that the public interest would be subserved if the Commission is free to choose among qualified applicants ^{1/} -- and Associates, as well as Corporation, is such an applicant.

2. Associates' application conforms -- and as originally filed conformed ^{2/} -- with all applicable rules of the Commission. Associates' application was returned by the Commission solely, because on the basis of the Commission's soil conductivity map, it appeared that the application violated the Commission's overlap rules in a de minimis report.

^{1/} See e.g., Louisiana Television Broadcasting Corp. 9 RR 894 (1953)).

^{2/} It is interesting that Corporation significantly amended its tower height proposal before its application was accepted for filing.

[72]

3. Associates now has established that the applications as originally tendered did not offend the Commission's overlap rules in any particular, not even in de minimis respects. ^{3/} Accordingly, the application was acceptable for filing, as tendered, and remains acceptable for filing.

4. No reason exists for denying acceptance. Associates prepared and tendered its application in good faith after substantial effort and not inconsiderable expense. It engaged competent and responsible technical advisers to prepare the engineering part of the application. To default Associates would be Draconian and would serve no public purpose. Indeed, by depriving the Commission of a choice between two applicants, the forfeiture would have an adverse impact upon the public interest. From such adversity -- to the public as well as to Associates -- only Corporation would benefit.

5. And Corporation has no equities which warrant consideration. It has no vested interest in Associates' misfortune. It has neither a statutory nor equitable right to win by default. If Corporation presents the better application, it should prevail. But the decision, in keeping with precedent and principle, should be on substantive merit, not on technical mishap. Associates asks

3/ The showing as to non-overlap did not vary the application. As the Commission has held in other contexts (Community Telecasting Corp., 18 RR 143 (1959)), this showing merely constituted reinforcement.

4/ Corporation imputes amendment to Associates. (Point 9). No amendment occurred as Corporation elsewhere recognizes. (Point 1).

[73]

only the right to have its application heard on the merits. It asks for nothing more - and nothing less would be compatible with sound public policy and the underlying public interest

Respectfully submitted,

NATICK BROADCAST ASSOCIATES, INC.

By: /s/ Jerome S. Boros
Fly, Shuebruk, Blume and Gaguine

* * *

Its Attorneys

[Certificate of Service]
September 21, 1965

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Wadsworth absent.

1. The Commission has before it for consideration (a) an application tendered for filing on August 2, 1965, by Natick Broadcast Associates, Inc. (Natick) for a new standard broadcast station construction permit; (b) an accompanying Petition for Reconsideration of action by the Commission in returning an earlier tendered application; (c) an Opposition to the Petition for Reconsideration by Home Service Broadcasting Corporation (Home Service) on September 10, 1965; and (d) Natick's Reply to the Opposition filed September 23, 1965.

2. Natick originally tendered an application on May 10, 1965, that date being the last day for filing an application that could be consolidated for hearing with a mutually exclusive application filed by Home Service on September 23, 1964.^{1/} The Natick application was returned as unacceptable for filing on July 2, 1965, after preliminary staff study revealed that the application contravened Section 73.37(a) of the Commission's Rules.^{2/} On August 2, 1965, Natick resubmitted the application along with a Petition for Reconsideration which included additional engineering data purporting to establish that the overlap prohibitions of Section 73.37(a) would not occur from the proposal.

^{1/} Both Natick and Home Service specify the same frequency (1060kc) for Natick, Massachusetts.

^{2/} Section 73.37(a) provides that "no application will be accepted for a new station" where the proposed operation's 0.005 mv/m groundwave contour would cause an overlap with a co-channel Class I station along its 0.1 mv/m groundwave contour. Natick's originally tendered application presented such an overlap with Class I, co-channel Station KYW in Philadelphia, Pennsylvania.

[75]

3. It is Natick's position that the Commission's action be reversed and the application accepted for filing because, as originally presented, the application did not involve an infraction of Section 73.37(a), as the new field intensity measurements submitted with the petition purportedly demonstrate. Additionally, Natick insists that since the originally tendered application "was timely tendered for filing and the instant retendering is without prejudice to, and does not derogate, [sic] from the May 10, 1965 tender," it is entitled to consideration with the mutually exclusive application of Home Service. To ensure consolidation, Natick also requests that the retendered application be treated as nunc pro tunc, i.e. as if filed on May 10, 1965. In its reply to responsive pleading filed by Home Service, Natick again stresses the acceptability of the application as originally tendered, this time noting that it was returned by the Commission solely because, on the basis of the Commission's soil conductivity map, it appeared that the application violated the Commission's overlap rules in a de minimis respect.

4. Despite Natick's characterization of the application as not being at variance with the one originally tendered, the unavoidable fact remains that the material offered to the Commission on May 10, 1965, was unacceptable for filing because of the Section 73.37(a) infraction. The basis for this conclusion was the ground conductivity values supplied by Figure M-3 of the Rules. In Spite of Natick's contention that the overlap reflected by these values was only in a de minimis respect, study made of the application at that time clearly indicated significant overlap of Natick's 0.005 mv/m contour and KYW's 0.1 mv/m contour, thereby negating the de minimis claim. The Figure M-3 values were equally available to the applicant who was on notice that the application would be considered in light of them, absent any pertinent field intensity measurements to the contrary. . Natick, however, did not provide any field intensity measurements until the application was retendered on August 2, 1965; and accordingly, that is the date by which this application must be judged.

5. More commonly called the Commission's cut-off rules, Sections 1.227(b)(1) and 1.591(b) preclude an application's consolidation with a mutually exclusive application if filed past a given date. By Public Notice given on April 2, 1965, a cut-off date of May 10, 1965, was given the application of Home Service, as indicated above, Natick did not have an application that could be accepted on that date, and consequently can not have its application considered with the application of Home Service. Furthermore, no sufficient reasons have been presented that would warrant treating Natick's application as filed nunc pro tunc, i.e., on May 10, 1965.

[76]

Accordingly, pursuant to Section 1.227(b)(4) of the Commission's Rules, IT IS ORDERED, That, the application of Natick Broadcast Associates, Inc. BE RETURNED; and

IT IS FURTHER ORDERED, That, for the reasons given above, the Petition for Reconsideration BE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

Adopted: February 9, 1966
Released: February 14, 1966

cc: Home Service Broadcasting Corporation
Fly, Shuebruk, Blume and Gaguine
Natick Broadcast Associates, Inc.

[77]

74

[77]

[Received FCC March 16, 1966]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of
HOME SERVICE BROADCASTING CORPORATION
Natick, Massachusetts
For Construction Permit

)
)
)
)

File No. BP-16,478

PETITION FOR RELIEF

Natick Broadcast Associates, Inc. (hereinafter referred to as "Associates"), by its attorneys, respectfully requests the Commission to set aside its Memorandum Opinion and Order, FCC 66-127, Mimeo 78407, released February 14, 1966, rejecting Associates' application and: (1) to accept the application for filing as having been tendered on May 10, 1965; or (2) to waive Sections 1.227(b)(1) and 1.591(b) of the Commission's Rules, insofar as they would preclude comparative consideration of Associates' application with the prior-filed application of Home Service Broadcasting Corporation (hereinafter referred to as "Corporation"); or (3) accept the application as having been tendered on August 2, 1965, nunc pro tunc as of May 10, 1965. Conjunctively, Associates requests such other and further relief as is equitable called for under the instant circumstances.

I.

Question Presented And Appropriate Disposition

1. This Petition presents the question whether it is in the public interest to reject summarily and deny comparative consideration to a good-faith, painstakingly prepared--(by the

[78]

principals)--100% locally-owned application^{1/} which conforms fully with the Commission's Rules, merely because of an unforeseen and unforeseeable (and therefore unavoidable) error in presentation, but not in substance, committed by Associates' consulting engineer. In short, the question is whether the public interest is served by depriving laymen-applicants of the opportunity to be heard on the merits, because of an apparent, but not actual, technical deficiency in their application beyond their capacity to comprehend and correct.

2. Associates submits that the public interest is not so rigid and unbending as to demand surface as well as substantive technical perfection of an application. To deny a conforming application the right to be heard because it apparently is non-conforming is Draconian and contrary to sound public policy and "the ends of justice" (Communications Act of 1934, as amended, Section 4(j), unless such severity has a salutary impact upon the Commission's processes and the Commission's statutory goals. But in order to be of immediate administrative and of long-range regulatory benefit, the severity must exercise a deterrent effect upon the submission of superficially erroneous applications. And this is impossible. No applicant instructs its engineers to err. Every applicant anticipates that, if it selects engineering consultants, who are in practice before the Commission, they will seek to make an acceptable showing, both superficially and

^{1/} All shareholders in Associates live in the proposed station's service area; all do not reside in Natick.

[79]

substantially. In short, the instant punishment of Associates' principals for their engineer's failure to demonstrate initially the absence of overlap, will grievously harm Associates without conferring any benefit upon the public in Natick, or the larger public interest. Indeed,

depriving the Commission of the opportunity to choose between applicants will redound to the detriment of the Natick listening public.

II.

Background of Proceeding

3. This case dates back four years to 1962 when Associates had its origin. That is, Associates evolved from an earlier unincorporated group of the same name organized in Natick, Massachusetts, in the early summer of 1962, when five local residents banded together to bring local radio service to the community. The AM "freeze" of the time precluded any application in that portion of the spectrum and consequently an FM application was contemplated. Preparatory to filing the application, civic leaders were consulted, legal counsel obtained, and technical work carried forward. However, prior to finalization of the application, the FM allocations rules were amended precluding the assignment of an FM station to Natick.

4. In the wake of this setback, three members of the group lost interest. The remaining two, Edward F. Perry, Jr. and Roland J. Boucher, Jr., obtained jobs in radio broadcasting and kept conversant with regulatory developments with a view

[80]

to bringing Natick its first local radio station.

5. In the early fall of 1964, when Perry and Boucher became aware that a daytime AM station might be located in Natick on 1060 kc, they sought co-venturers to participate in an application for 1060 kc in their home town of Natick. First, William F. Miller, a graduate of Boston University's School of Communications and an employee of a Boston radio-television licensee, was recruited. Shortly thereafter, Leon M. Fox, a long-time Natick resident became local counsel and another participant in the venture.

6. At this juncture, work was initiated on the preparation of the application. An engineering consulting firm with experience before the Commission was selected, and a search was made for additional participants of sound financial standing. Four individuals with business interests in Natick who shared the opinion that the town needed a radio station thereupon joined in the venture.

7. In early 1965, the eight co-venturers organized Associates as a Massachusetts corporation. Meanwhile, local programming needs were extensively canvassed through a series of personal interviews involving the participation of Associates' eight shareholders. In excess of 100 separate interviews were held and the result were used in the formulation of Associates' programming proposal. (Exhibit 1).

[81]

8. Also relied on were the opinion of an Advisory Council which Associates organized to advise it on a continuing basis. (Exhibit 1). Specifically, on April 29, 1965, prior to finalization of Associates' proposal, a dinner meeting of several hours was held at which the opinions of the Advisory Council were freely solicited and freely offered. These opinions, too, were used in shaping Associates' programming proposal.

9. On May 10, 1965, Associates tendered for filing its application. To the best of Associates' information, knowledge and belief, the tendered application was complete in all respects. All sections of the application form were submitted, all applicable questions were fully answered, and all exhibits were supplied. The requisite filing fee was also submitted. The application was tendered for filing in sufficient time for it to be entitled to comparative consideration, pursuant to the Commission's April 2, 1965, "cut-off" list (FCC 65-267), with the mutually-exclusive application (BP-16,476) of Corporation.

10. That application originally was tendered for filing on September 23, 1964. However, as submitted, Corporation's application specified an antenna radiation of 190 mv/m kw which would have led to a violation of the Commission's overlap rule rendering Corporation's application unacceptable for filing. In addition, Corporation also deliberately withheld a balance sheet of the party who would be the source for the entire equity money in Corporation (Exhibit FF-3, par. D). Likewise omitted by Corpor-

[82]

ation in its application were data required by Section III, paragraphs (c), (e) and (f) of Form 301.

By letter dated November 23, 1964, the Commission informed Corporation of the problem with respect to overlap and allowed it 20 days "to permit consideration of the problem. . ." (Exhibit 2). On or about November 30, Corporation amended its application to cure the overlap problem by "modifying the antenna height" (Exhibit 3). Thereafter, without considering the deliberate incompleteness of Section III of Corporation's application, the Commission accepted it for filing.

12. An entirely different procedure was followed with respect to Associates' application. Upon examination of the engineering showing, the Commission concluded on the basis of its soil conductivity map, that the proposal violated the overlap rule because of the extension of "certain critical azimuths involving salt water paths". However, despite Associates' representation that no prohibited overlap would result, the Commission did not accord Associates an opportunity to be heard on the question whether objectionable overlap actually existed, as contended by the Commission, or whether objectionable overlap was absent, as contended by Associates. Without according Associates the same opportunity that previously had been afforded Corporation to clarify

the overlap situation, the Commission rejected Associates' application out of hand -- on the sole ground that overlap (to an unspecified extent) was involved.^{2/}

^{2/} Attached is Exhibit 4, an affidavit by Jules Cohen and Associates special engineering consultants to Associates who did not prepare Associates' application. The affidavit shows that the total amount of overlap amounts to twenty square miles on the basis of Figure M-3.

[83]

13. In view of this apparent collision of opinion between the Commission and Associates, the latter undertook to resolve the question definitively by the taking of field intensity measurements. At substantial expense and at great personal effort on the part of Edward F. Perry, field intensity measurements were made and collated. These measurements confirmed the absence of prohibited overlap, and supported by documentation the application's conformity to the Commission's Rules. Hence, they were submitted to the Commission as part of Associates' Petition For Reconsideration dated July 30, 1965.

14. By Memorandum Opinion and Order, released February 14, 1966, the Commission rejected the Petition For Reconsideration and re-rejected Associates' application. The second rejection of the application was not predicated upon any overlap -- which was essentially abandoned as a reason for non-acceptance -- but on the ground that Associates

"... did not provide any field intensity measurements until the application was re-tendered on August 2, 1965; and accordingly, that is the [filing] date by which this application must be judged."
(Underscoring added).

Furthermore, the Commission concluded:

"... no sufficient reasons have been presented that would warrant treating Natick's [Associates'] application as filed nunc pro tunc, i.e., on May 10, 1965."

III.

Relief Requested

15. Associates has outlined the relief which is appropriate in the preambulatory paragraph of this Petition. Unless its application is treated as having been timely filed and is consolidated

[84]

for hearing with Corporation's application, Associates will lose the opportunity to be heard on the merits and the Commission will be deprived of the advantage of selecting amongst all the qualified applicants the one best suited to serve the public interest, convenience and necessity. Such a result would be unjust and in derogation of the spirit of Section 303 of the Communications Act of 1934, as amended, which directs the Commission to "encourage the larger and more effective use of radio in the public interest." The more "effective use" of a given frequency can be properly determined only if the Commission has the widest possible choice in selecting a licensee. The Commission's policies always have been designed, within the ambit of administrative feasibility, to accomplish this objective, which, in this instance, should not be defeated.

15. The unusual circumstances of this case clearly require grant of the requested relief requested on several distinct grounds. First, the application, as tendered on May 10, 1965, in fact complied with all the Commission's Rules, including the overlap rule, despite any appearances to the contrary. Secondly, since the Commission previously had accorded Corporation an opportunity to clarify its showing with respect to prohibited overlap, a like opportunity should have been extended to Associates. Thirdly, in any event, any apparent overlap was de minimis and not substantial (20 square miles)^{3/} and should thus have been disregarded. Fourth, in view of the conflict between the apparent de minimis overlap claimed by the Commission and the non-existence of overlap, contended by Associates, a hearing was called for to resolve

the matter and to

^{3/} See Exhibit 4.

[85]

determine whether a waiver should issue. Fifth, upon Associates' retender of its application, together with a supporting petition for reconsideration, the Commission in accord with its existing practice, should have treated the engineering measurements as reinforcing, rather than demonstrating the incompleteness of the May 1965 application. Sixth, at any rate, the Commission should have regarded the May 1965 application as "substantially complete". Finally, the Commission should have accepted the application nunc pro tunc as of May 10, 1965.

IV.

Initial Rejection Of The Application Was Unwarranted

16. The Commission's July 2, 1965 rejection of Associates' application was unwarranted. Review of the application disclosed that only 20 square miles of overlap apparently was entailed. Particularly, under these circumstances, the Commission either should have treated Associates the way it had treated Corporation and afforded Associates an opportunity to clarify the overlap situation or, at a minimum, accorded Associates a hearing on the extent of overlap, if any, and the appropriateness of waiver.^{4/} United States v. Storer Broadcasting Co., 351 U.S. 92. Its summary dismissal of Associates' application was Cinderella-like and reflected a disregard of its statutory obligations. As the Supreme Court observed in National Broadcasting Co. v. United States, 319 U.S. 190 at 22S:

^{4/} The fact that Associates had not requested a waiver is immaterial. It had not been accorded an opportunity to do so and, in any event the Commission is not a mere referee in broadcast matters; it is charged with an affirmative duty to promote the broadcasting industry.

[86]

"The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."

17. The Commission has not been inalert to these statutory responsibilities in other contexts. Only recently in United Broadcasting Company, Inc. (WOOK), FCC 65-657, Mimeo 71140, released August 3, 1965, the Commission waived actual overlap and accepted an application for filing nunc pro tunc so as to consolidate it for hearing with a mutually-exclusive renewal application which already had been designated for hearing. The basis for the Commission's action was that the overlap rules "were not intended to relieve the Commission of its primary duty under the Act to effect a 'fair efficient, and equitable' allocation of frequencies through the country".

18. This doctrine has specific applicability here, particularly since Natick may otherwise go without its first broadcast station forever -- or, at least, for an inordinate length of time. For, as Associates noted in its Reply of March 4, 1966, Corporation's financial, coverage, and staff proposals reveal its unfitness to obtain the license sought. Accordingly, Corporation's application is not likely to be granted and Natick is likely to be bereft of a station indefinitely, if not for all time.

V.

Associates' Application Was, At Least, Substantially Complete When Filed On May 10, 1965 And Should Have Been Accepted For Filing As On That Date Subject To The Supplying Of Any Necessary Reinforcing Information

19. Associates already has pointed out that its application was complete when filed. All Sections were supplied, all questions were answered, and all required exhibits were attached. The measurement data which the Commission contends is an integral part of Associates' application actually is not called for by the application form and constituted mere reinforcement of the showing made in the application. (See e.g. Community Telecasting Corp., 8 RR 143 (1959)).

20. At all events, the application was "substantially complete". This conclusion is based on the facts and equities of this situation and by Commission decisions in far less compelling cases.

21. Thus in Docket No. 12064, et al, the Commission accepted an application for filing although it was deficient in the following respects:

(a) the articles of incorporation showed that the name of the applicant was "Elmwood Park Broadcasting Corporation" while the applicant had listed its name as "Elmwood Park Broadcasting Corp." on page 1 of the application; (b) no by-laws were submitted; (c) information regarding the naturalization of certain of the stockholders, their addresses, and their business and financial interests for the past five years were not furnished; (d) it was not

[88]

possible to determine the number of shares of stock that had been issued and; (e) no live programming was shown in the program analysis; (f) exhibit 2.B was omitted; and (g) Section V-B and V-G pertaining to engineering, antenna, and site data, and exhibits were not included in the application.

22. In a like vein the Commission accepted for filing, as substantially complete, applications lacking the following substantive data:

No program classifications as requested by Section IV, paragraph 4(b);^{5/} insufficient number of exhibits required by Section V-G, partnership agreement omitted partnership name, no letter of credit from equipment manufacturer, no showing of areas within proposed contour as required by Section V-A, and remote control point not definitely specified;^{6/} no answer to Section IV, paragraphs 6 and 7, no letter of credit from equipment manufacturer, and remote control point not definitely specified;^{6/} cost of land and plans for securing same omitted;^{7/} cost of land and buildings omitted, no net income statement or balance sheet, and no letter of credit from equipment manufacturer;^{8/} Section III omitted entirely and failure to show population loss in accordance with Rule 3.28(c);^{9/} Section V-A, paragraph 7 omitted;^{10/} two copies of Section V-G omitted and not filed until three

^{5/} See 309(b) letters to Voice of Three Rivers dated September 15, 1960 and R.W. Woodruff dated July 14, 1960.

^{6/} See letter from applicant, File Number BP-13961, dated October 27, 1959.

^{7/} See 309(b) letter to Radio Joliet, dated September 15, 1960.

^{8/} See 309(b) letters to Radio Station WXEN, dated September 15, 1960 and to Felix C. Abernathy, dated October 27, 1960.

^{9/} See 309(b) letter to Morris Mindel, dated November 2, 1960.

^{10/} See 309(b) letter to WIGM, Inc., dated April 14, 1960.

[89]
months after acceptance of application;^{11/} financial section of application incomplete; no balance sheets and financing incomplete;^{12/} failure to show population loss in accordance with Rule 3.28(c);^{13/} no program schedule as required by Section IV.^{14/}

23. As the foregoing applications were considered substantially complete and accepted for filing, certainly Associates' application must be accorded like treatment, for as the Commission has stated:

"... an application does not have to be letter perfect and contain all information necessary to convince the Commission that a grant would serve the public interest as a condition precedent to acceptance for filing. Rather, our practice has consistently been that if an application is substantially complete, it is accepted for filing and the applicant is afforded the opportunity to supply any other necessary information by amendment."

Muskingum Broadcasting Company, 19 R.R. 552 (1960).

In this connection it should be noted that even where applications bore defective verifications they were accepted for filing and opportunity for corrective action was afforded the applicant. Teleservice Company, 17 R.R. 981 (1958); Johnson Broadcasting Company, 5 R.R. 1326 (1950). It is clear that Associates' application was far more substantially complete than those cited above.

24. Furthermore, under the unusual circumstances attending the submission of the measurement data, which resulted from a technical decision by Associates' consulting engineer which Associates

^{11/} See 309(b) letter to Thomas K. Cassell, dated September 4, 1958.

^{12/} See 309(b) letter to Jasmin Property, dated January 28, 1960.

^{13/} See 309(b) letters to Barsland Inc., Jones Park Broadcasting Company, Television Corporation of Michigan and Lake Zurich Broadcasting Company, dated September 9 and September 15, 1960.

^{14/} See 309(b) letter to Shorewood Broadcasting Company, dated November 7, 1960.

[90]

principal could not control, it would be inequitable to deny the applicant the opportunity to be heard together with mutually exclusive applications. The Commission has so-held in re Application of B.P. Hart (F.C.C. 60, 696, June 17, 1960):

"... we note that the statutory requirement to have an application signed and sworn to by the applicant is intended to place personal responsibility for the application on the applicant. . . only the inadvertence of the petitioner's attorney precluded compliance with the Commission's filing procedure by the required date. In view of these circumstances, we believe that the equities favor our accepting the petitioner's original application. . ."

The situation here is precisely analagous, and the substitution of the words "office of the petitioner's engineer" for the words "of the petitioner's attorney" in the above quotation would make the instant situation synonomus with that in the B.J. Hart Case.

VI.

Precedent As Well As Principle Requires
That Even If The Application Was Not
Substantially Complete On May 10, 1965,
It Should Be Accepted For Filing Nunc
Pro Tunc As Of That Date, i.e.
8, 1960

25. There is compelling authority for the Commission to accept the instant application nunc pro tunc as of May 10, 1965, its date of tender. In the B.J. Hart Case an unsigned and unverified application tendered for filing on March 25, 1960 was returned. It was refiled properly executed, on April 18, 1960.^{15/} In that case the petitioner would have been excluded from comparative consideration with other conflicting applications had the Commission accepted the application as of April 18 rather than March 25, the cut-off date for filing applications conflicting with prior filed applications. There, the petitioner asserted that the original

15/ Three copies of the application has been filed on March 25 none of which bore the signature of the applicant.

[91]

copy signed copy of the application was in existence, signed and verified by the cut-off date, but through the inadvertence of petitioner's attorney a clerical error resulted in the original being retained as a file copy in the attorney's office. The Commission granted a petition to have the application treated as having been filed nunc pro tunc on March 25, 1960 stating as follows:

"... We find that although petitioner's application did not meet the requirements of the Communications Act and was not in accordance with the usual Commission procedure when submitted on March 25, 1960, since three copies rather than the original was in existence properly signed and verified, and that said application was substantially complete. Moreover we note that the statutory requirement to have an application signed and sworn to by the applicant is intended to place personal responsibility for the application on the applicant. The purpose of this requirement was therefore met and only the inadvertence of the petitioner's attorney precluded compliance with the Commission filing procedure by the required date. In view of these circumstances we believe that the equities favor our accepting the petitioner's original application, nunc pro tunc as of March 25, 1960."

26. The relief of nunc pro tunc is not limited to the Hart Case but has a long history in proceedings where the equities, as here, dictate the requested relief. For example, in WPFA Radio Inc. an application was filed on May 15, 1959, the cut-off date for the filing of applications conflicting with previously filed applications. By letter of June 3, 1959 it was returned to the applicant because although signed it was not notarized. On June 10, 1959 the application properly verified was

resubmitted with the applicant's admission that notarization had been completely overlooked. It was also requested that the verification supplied with the resubmitted application be treated as an amendment to the application.

[92]

VII.

Conclusion

27. For the foregoing reasons, equitable relief, as requested, should be granted to Associates. Its application should be accepted and consolidated for filing with Corporation's application since, as originally filed and presently, it conforms fully with the Commission's rules, including the overlap rule. At a minimum, in view of the de minimis (20 square) miles overlap which is the apparent amount resulting from use of the soil conductivity map, Associates should be granted a hearing as to the extent of overlap, if any, and whether they overlap should be waived.

28. Nothing less would ensure the ends of justice. Associates made a good faith effort to submit an application which apparently as well as actually complied with the Commission's Rules. Its principals, as layman, had no way of superintending, or controlling or varying the technical showing. They should not therefore be defaulted without hearing when they are faultless, and their proposal actually complies with the Commission's Rules.

Respectfully submitted

Natick Broadcast Associates, Inc.

By: /s/ Jerome S. Boros

* * *

Its Attorneys

March 16, 1966

[Certificate of Service]

EXHIBIT I

[94]

State of Rhode Island and Providence Plantations)
County of Newport) SS
Town of Portsmouth)

Edward F. Perry Jr., being first duly sworn on oath, deposes and says:

1. That he is President of Natick Broadcast Associates, Incorporated, Natick Massachusetts;
2. That Natick Broadcast Associates, Incorporated has conducted extensive research into the radio programming needs of the communities it proposes to serve;
3. That toward determining these programming needs, Natick Broadcast Associates, Incorporated has established a permanent advisory council, the membership of which is set forth on the attached appendix;
4. That to further determine programming needs, Natick Broadcast Associates, Incorporated has established more than one hundred program contacts, each of whom has been personally interviewed by a stockholder in the corporation;
5. That every stockholder in Natick Broadcast Associates, Incorporated has established program contacts and has participated in recruiting members for the advisory council.

/s/ Edward F. Perry Jr.,
Affiant

[JURAT dated March 14, 1966]

[95]

APPENDIX

NATICK BROADCAST ASSOCIATES, INC.

203 Pond Street

Natick, Massachusetts

Advisory Council Members - April, 1966

Dr. Ernest Adams, Natick Board of Health

Mr. Fiske Adams, President, The Album, Inc., Framingham

Mr. Paul S. Ambler, Chairman of Natick School Committee

Mr. Steven R. Blinn, Superintendent of Recreation, Natick

Mr. Isaiah Chase, Principal, Westwood High School

Mr. Warren A. Colson, Assistant Director of Continuing Education,
Framingham State College

Mrs. Mary Elizabeth Dowse, Director, Sherborn-Ashland Campfire Girls

Dr. Harry Freeman, Director of Research - Medfield State Hospital

Rabbi Alfred L. Friedman, Framingham

Miss Jean Glasscock, Publicity Director, Wellesley College

Mr. William G. Guernsey, Lecturer, Boston College

Mrs. Janet Guernsey, Professor of Physics, Wellesley College

Mr. Paul Jameson, Moderator, Town of Wellesley

Rabbi Daniel L. Kaplan, Needham

Dr. Kaufman, Natick

Mr. Edward B. Keyes, Teacher and Coach, Medfield High School

Miss Barbara L. King, Teacher, Natick School System

Mr. Buane Kocina, Assistant Principal, Westwood High School

Rabbi Jacob Lantz, Wellesley

Dr. William H. Likins, President, Natick Ministerial Association
Minister, Fisk Memorial Methodist Church, Natick

Dr. Fritz F. Lindquist, Superintendent of Dover-Sherborn Schools

Mr. Peter A. Lombardi, President, First National Bank of Natick

[96]

- Rev. Ray M. Marshall, President, Natick Service Council
Minister, First Baptist Church, Natick
- Mr. Francis McDonald, President, United Auto Workers, Local 422,
Framingham
- Mr. Francis G. McGee, Moderator, Town of Natick
- ~~Rev. Richard McHale, Pastor, St. Patrick's Parish, Natick~~ deceased
- Mr. Charles McManus, Assistant Principal, Natick High School
- Dr. David Mindess, Assistant Superintendent of Schools, Ashland
- Mr. Russel Mulhern, Civil Engineer, Needham
- Mr. Frank E. Panaro, Assistant Principal, Medway High School
- Dr. C. Newton Peabody, Surgeon, Framingham Union Hospital
- Mr. Edward F. Perry, Professor of History, Boston University
- Mrs. Mary M. Perry, Teacher, Needham Public School
- Mr. Edward J. Reilly, Director, Framingham United Fund
- Mr. Walter B. Robinson, Treasurer, New England Pressed Steel Company
- Rabbi Hilel Rudavsky, Framingham
- Mr. Robert C. Schnetke, Public Relations Director, Algonquin Council
Boy Scouts
- Mr. George Sellew, Selectman, Natick
- Rev. William B. Shea, Director of Education, Marion High School,
Framingham
- Rev. Paul D. Tiller, Minister, First Congregational Church of Natick
- Mr. William A. Vellante, Principal, Millis Junior-Senior High School
- Mr. Richard L. Ward, Publications Manager, Digital Equipment
Corporation, Maynard
- Mr. Roger M. Woodbury, Assistant Superintendent of Schools, Wellesley
- Mr. Joseph Brown, Director, Middlesex County Extension Service
- Mr. Tassos P. Fillides, Teacher, Natick High School

[97]

92

[97]

EXHIBIT II

19,
November 23, 1964

8831

Home Service Broadcasting Corporation
c/o John H. Garabedian
27 Ledge Wood Road
Weston, Massachusetts

Dear Sir:

This is in regard to the application tendered for filing on September 23, 1964, for construction permit for a new standard broadcast station to operate on 1060 kilocycles, 1 kilowatt of power, daytime only at Natick, Massachusetts.

It is indicated in your application that the proposed antenna system would radiate 175 mv/m/kw and that this value of radiated field would not cause the proposed 0.005 mv/m contour to overlap the 0.1 mv/m contour of Station WRCV, Philadelphia, Pennsylvania. However, utilizing Figure 8 of Section 73.190 of the Commission Rules it appears that the proposed antenna radiation efficiency would be more nearly 190 mv/m/kw. On the basis of this higher efficiency, the proposed 0.005 mv/m contour would overlap the 0.1 mv/m contour of WRCV. Pursuant to the provisions of Section 73.37(a) of the Commission Rules, such overlap would render your application unacceptable for filing.

Since you did not clearly indicate whether the radiation would be restricted to a value of 175 mv/m, further action on your application will be withheld for a period of twenty (20) days from the date of this letter to permit consideration of the problem noted herein. Failure to reply within this period of time will render your proposal subject to dismissal.

Very truly yours,

Ben F. Waple
Secretary

[98]

EXHIBIT III

Home Service Broadcasting Corp.
c/o John H. Garabedian
27 Ledge Wood Road
Weston, Massachusetts 02193

Ben F. Waple, Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: 8831

Dear Sir:

This is in regard to your letter requesting clarification of certain facts concerning the antenna system in our application for a new standard broadcast station to operate on 1060 kilocycles, 1000 watts power, daytime only at Natick, Massachusetts.

We hereby amend our application to the extent of modifying the antenna height. All computations and exhibits in the original application were prepared using an antenna efficiency of 175 mv/m/kw, thus they all remain quite valid. Consider paragraph 3, figure 6, of exhibit EE-1 which states: "An unattenuated field intensity at one mile of 175 mv/m has been used to determine the proposed contours. . ."

The erroneous 230' radiator height (which would indeed radiate 190 mv/m/kw) was determined by an error in calculation.

This amendment simply proposes a radiator height of 140' to properly execute the intended efficiency. Enclosed are five copies of the pertinent pages from F.C.C. form 301 with the corrected information. The remainder of the application remains "as is" with the exception of "Tower Costs" in Exhibit FF-1; this of course becomes more economical with a shorter tower.

We are sorry to have caused you this discrepancy and wish to thank you for calling it to our attention.

Also enclosed are three copies of a page on the business and financial interests of John I. Carlson, Jr., a Director in our Company. It should be attached to Section II, Table II of the application. Somewhere in the publication process, this information was apparently left out.

As we recently completed successful negotiations with United Press International to supply news service to the proposed station, we would at this time like to submit three copies of this agreement for amendment to Exhibit FF-1.

We are at your disposal for any questions in regard to this application.

Very truly yours,

/s/ John H. Garabedian
President

EXHIBIT 4

JULES COHEN & ASSOCIATES
Consulting Electronics Engineers
Washington, D.C.

ENGINEERING STATEMENT
IN BEHALF OF
NATICK BROADCAST ASSOCIATES, INC.
NATICK, MASSACHUSETTS
1060 KC/S 1.0 KW D

Paul L. Wimmer, being first duly sworn, says that he is a partner in the firm of Jules Cohen & Associates, consulting electronics engineers, with offices in Washington, D.C.; that he is a professional engineer registered in the District of Columbia and that his qualifications as an expert in engineering are a matter of record with the Federal Communications Commission. The instant engineering statement was prepared in behalf of Natick Broadcast Associates, Inc., in support of a Petition for Relief.

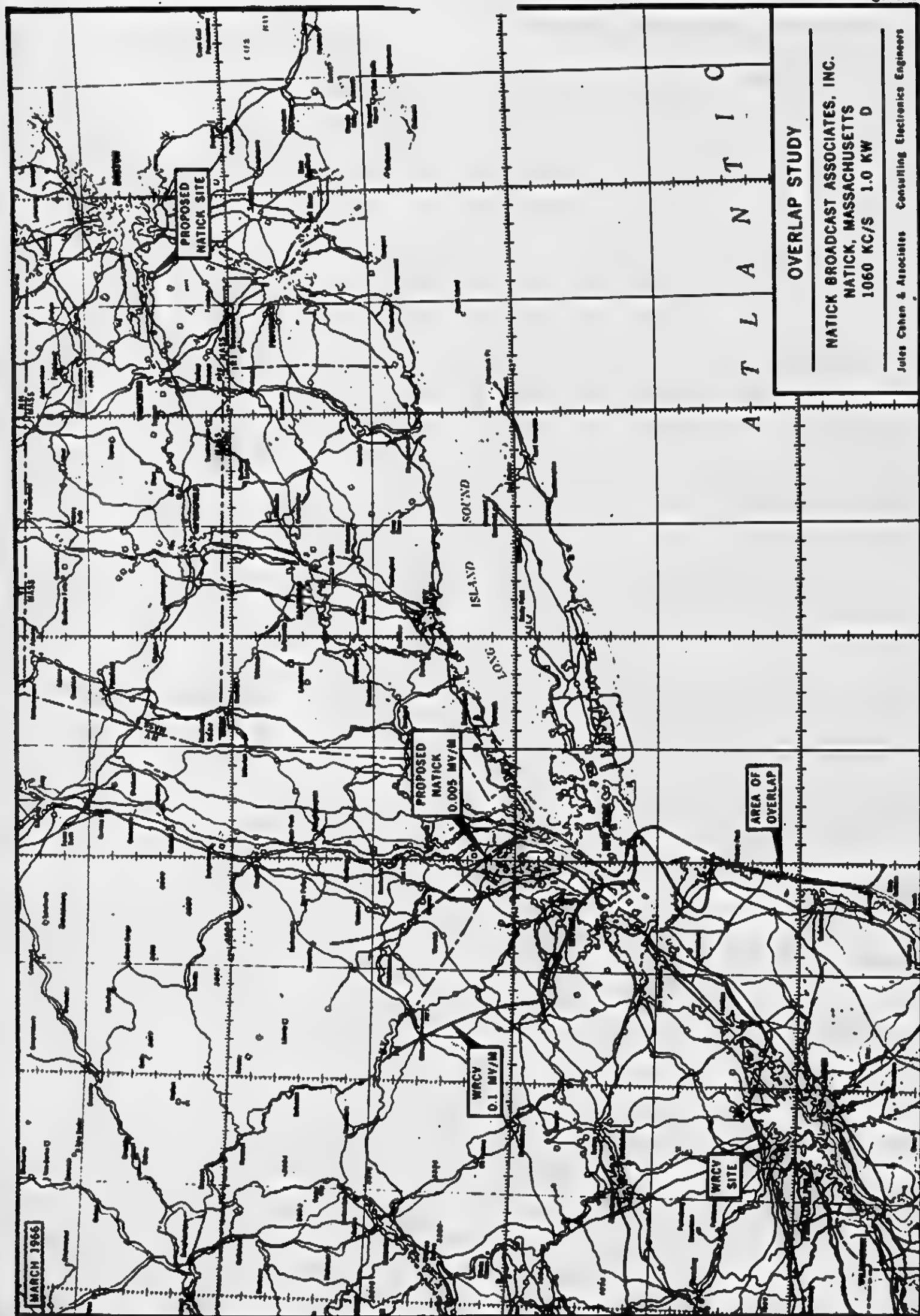
In April, 1965, Natick Broadcast Associates, Inc., filed with the Federal Communications Commission an application for construction permit specifying 1060 kc/s with power of 1.0 kw, employing a non-directional antenna during daytime hours only. In July, 1965, the Commission returned the application to the applicant indicating that it did not conform to Section 73.37 of the Rules. Specifically, the apparent deficiency dealt with overlap of the KYW (now WRCV), Philadelphia, Pennsylvania, 0.1 mv/m contour and the proposed Natick 0.005 mv/m contour. The attached Figure 1 is a map showing the area wherein overlap of these contours would occur. The area consists of approximately 20 square miles along the eastern shore of New Jersey. The path from the Natick site to the area of overlap consists substantially of salt water-- Long Island Sound and the Atlantic Ocean. The area of overlap is approximately 30 miles long and penetrates the land area a maximum of approximately one mile.

[100]

The contours shown on the attached map were based on conductivity values obtained from the Commission's soil conductivity map M3. Radiation efficiency for the Natick operation was assumed to be 237 mv/m as shown in the Natick application. Radiation values for WRCV were obtained from that station's measured pattern shown in File No. BL-6039. Where the signal path traversed varying ground conductivity, the equivalent distance method was employed in calculating the distances to the contours.

/s/ Paul L. Wimmer

[JURAT dated March 16, 1966]



[102]

[Received March 17, 1966]

ERRATUM

Natick Broadcast Associates, Inc., submits this Erratum consisting of one attached page of text which inadvertently was omitted from Petition for Relief, dated March 16, 1966.

Respectfully submitted

NATICK BROADCAST ASSOCIATES, INC.

By: /s/ Jerome S. Boros

* * *

[Certificate of Service]

Its Attorneys

[103]

nunc pro tunc as of May 15, 1959, the original filing date. The Commission granted the request despite the absence of the unusual equities pervading the instant situation.

"VI"

The Requested Relief Is Consistent With
The Orderly Administration of The Commission's Processes And Serves the Ends
of Justice.

26(a). Section IV(j) of the Communications Act prescribes that:

"The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

The Commission has consistently recognized its responsibility to serve these ends. In this connection it is apparent that favorable action by the Commission on the instant petition would not adversely affect the Commission's processing procedures nor establish undesirable precedent, and will serve the ends of justice.

26(b). The "cut-off" Rule was adopted to permit the expeditious processing of applications -- not to prevent the Commission from considering qualified applicants. The objective sought by this Rule is

a worthwhile one, indeed, a necessary one. However, the Rule should not be slavishly followed so that public interest considerations of substance are subordinated to considerations of form. Here no prejudice would be visited upon Corporation by waiver of the "cut-off" Rule particularly in view of the solicitude which previously has been extended to Corporation. Moreover, no precedent will be created. For, as noted earlier equitable relief in the instant situation will not encourage engineers deliberately to make technical errors to the detriment of their principals.

[104]

OBJECTIONS TO PETITION OF NATICK BROADCAST ASSOCIATES, INC.
FOR RELIEF

I.

The Petition of Natick Broadcast Associates, Inc. (hereinafter referred to as "Associates") for Relief should be denied.

A.

1. The Commission's rejection of Associates Petition for Reconsideration was correct and sound and the present Petition for Relief is in essence the same rejected petition in another form.

2. The issue here is not a question of what is in the Public Interest.

- a. Public Interest comes up as a factor only after the requirements of the Rules have been met by the applicant. It is not a substitute for meeting the requirements of the Rules.
- b. Under the guise that Public Interest is involved, Associates seeks to have the Rules ignored or the orderly enforcement of them abandoned.
- c. Sound Public Policy and Sound Public Interest demand orderly procedure to carry out the responsibility of the Commission.

[105]

3. The Commission has the responsibility that it must carry out and Rules have been set up by which this responsibility can be carried out for the Public Good and for the Public Interest.

- a. Associates are here in effect seeking to have the Commission ignore the very fundamental rules of orderly procedure on a matter of major significance on rules that are clear cut and unequivocal in language and intent.

4. If Associates could successfully insist that the Commission adopt it's position and accept its application, then no rule could ever be enforced. Every applicant could then extend, vary, alter and in fact make a nullity of the "cut-off" or of any other requirement or Rule.

B.

1. The proposal as contained in Associates application did not conform to the Commissions Rules.

- a. The application as tendered with the Commission on the "cut-off date" reflects overlap.
- b. The application of Associates did not "conform fully with the Commission's Rules" as they boldly contend without scintilla of support. Associates application was filed at the last minute before expiration of the "cut-off date" up to which time amendments, alterations or changes in the application could be made. Neither the Commission nor the other applicant is responsible for Associates failure to act with diligence. The application as filed by Associates on the cut-off date was not complete and was defective.
- c. The Commission could not function to prevent chaos and confusion if the Commission could not enforce a Rule as important as the ones involved here.

[106]

C.

There is nothing with defective applications that could be considered unforeseen or unforeseeable. The Commission has to effect some standard of responsibility in the presentation by an applicant. The very least it can expect is that applicant does not seek radio facilities which interfere with existing stations.

1. It is clearly foreseeable that an application will be rejected if it proposes overlap and it could have been foreseen by Associates that the Commission was bound to reject an application with overlap.

2. The role that Associates takes and seeks to have the Commission approve is that of "innocent laymen" without capacity to "comprehend or correct" the illegal overlap. Yet the application of Associates clearly contradicts this role:

(a) Edward F. Perry, Jr. the President is set forth in the application "... (Perry's) professional broadcasting experience involves employment with WMRC, Milford as consulting engineer. ..." "... chief engineer and week-end announcer, WYNG, Warwick, R.I." On page 7 of Associates Petition for Relief, we quote "... At substantial expense and at great personal effort on the part of Edward F. Perry, field intensity measurements were made and collated."

(b) Roland J. Boucher, a Vice-President is described in the application "... (Boucher) is employed as an engineer-technician by WIHS-TV, Boston. He held the same position with WBZ, Boston. (underscoring added)

But

Even if the President and Vice-President were not well schooled in Broadcast Engineering which they held themselves out to be, the Commission has insisted time and again that applicants are

[107]

expected to engage "competent engineering counsel".

D.

The Associates state that one procedure was used for Home Service in regard to its amendment regarding tower height and another different procedure was used for Associates and intimates unfairness.

1. Associates fall far short of fairness and honesty in ignoring the patent difference and distinctions.
 - (a) Home Service application was tendered September 23, 1964 and contained an error in calculation due to a simple oversight in computing antenna efficiency. It had proposed radiating 175 mv/mkw, but the proposed 230' antenna height would have radiated more nearly 190 mv/mkw - and caused overlap.
 - (b) The Commission gave 20 days to modify the 230' antenna proposal and this was done and the antenna height set at 140'.
 - (c) The amendment was made within the specified time and the overlap eliminated long before the cut-off date set by the Commission and the application subsequently was accepted and assigned File Number BP-16,478. All was in conformity with Commission Rules and in accordance with Established Procedure.
 - (d) A cut-off date of May 10, 1965 was thereafter set. Associates on the last possible day for filing mutually exclusive applications (May 10, 1965) tendered its application.
2. Associates proposed a 470' antenna (radiating 237 mv/mkw) that would cause serious interference to Class 1 Clear Channel KYW, Philadelphia in flagrant violation of Section 73.37 of the Rules.
 - (a) The Commission had already determined a 230' tower violated overlap and six months later on the very last eligible day Associates

[108]

in its application proposed a 470' antenna. Certainly this was a most fundamental matter not requiring engineering skill to know that if a 230' antenna was unacceptable for overlap, then one two times as high (470') could not be acceptable and would certainly cause overlap.

(b) Associates seek to amend the application after the cut-off-date - (to abrogate Rules of the Commission).

(c) Overlap is a violation of the Rules and under the provisions of Section 1.566 (a) since Associates application was not accompanied by a request for waiver, was defective, and not accepted for filing.

(d) There is an express prohibition under the Rules against amending a defective application after the cut-off date.

(1) This is not reinforcing as Associates claims, it is an attempt to cure an incurable defect. It is an attempt to reverse and amend its application in contradiction to information and data provided in the original application as tendered.

(2) In the application of Associates as tendered, it shows the use of F.C.C. Map M-3 to determine "appropriate" conductivities in computing contours - which they represent as being free from overlap. But - The map they now seek to furnish clearly shows overlap. They now seek to substitute a conductivity of 1.11 in place of the original Map M-3 conductivity value of 2 which they proposed. This is not reinforcing; it is change and amendment.

(e) No request for waiver was ever made nor was any amendment made by Associates to cure a defective application until after the cut-off date.

[109]

(f) Associates have cited many instances of relief given, but they all fall under the provisions of Section 1.564 of the Rules. They have not cited any instances where new overlap was proposed and relief was granted in circumstances similar to the instant case.

(g) The application as filed on the cut-off date was not complete, was defective, and without filing and granting of a waiver of overlap rules and could not be consolidated for hearing with the previously filed application of Home Service.

E.

Overlap violation is a fundamental major factor and not a minor one as contended by Associates.

1. There is no more serious responsibility of the Commission than to keep broadcast channels free from interference by overlap. With this responsibility they must have authority to regulate and rule to prevent overlap.
2. Home Service suggests that Associates are guilty of being frivolous in their contention that there was not and never was overlap but only that they forgot to include ground conductivity measurements.
 - (a) There was overlap to Class 1 Clear Channel KYW, Philadelphia.
 - (b) Associates position is in effect a request to ignore the provisions of the Rule requiring application for waiver of overlap, Section 1.227 (b)(1), 1.564, and other pertinent sections.

(c) Again, indication of frivolous contention is Associates assertion that the conductivity measurement data was not necessary in the original application since it "is not called for by the application form". The need, purpose, practice, and procedure concerning ground conductivity measurements in allocations is clearly set forth in the Commission Rules, Section 73.183.

[110]

F.

BACKGROUND PROCEEDING

In Associates recitation of Background Proceeding II, the following ought to be brought to the attention of the Commission.

1. This case does not date back to 1962 and the Commission records will not disclose any such fact but only that Associates application was tendered for filing on May 10, 1965.
2. The Corporation of Associates was not formed until 1965 and after Home Service's completed application had been filed and accepted.
3. Even though Associates states that to the best of its knowledge and belief its application was complete, it was not complete but defective. Mere examination of its application discloses much more incompleteness.
4. Its application was not as it alleges complete nor timely filed to entitle it to comparative consideration, but under the Commission Rules, Section 1.227(b)(4) it could not be given comparative consideration.
5. In paragraph 10 of Associates Petition for Relief, it is again guilty of misleading and inaccurate assertion to wit:

"(Home Service's) application specified 190 mv/m/kw..."

In its original application, Home Service specified an antenna efficiency of 175 mv/m/kw - it never mentioned the figure 190 mv/m/kw.

6. Mere reference to the application of Home Service will disclose the deliberate attempt by Associates to mislead the Commission in paragraph 10 of its petition referring to withholding of a certain balance sheet by Home.

(a) The application of Home Service did not specify Norman W. Farley, Sr. as the entire source of equity money, only that he could be called upon as another source of strength. Norman W. Farley, Jr. had commitment on the basis of his own assets.

[111]

7. The Decision of the Commission on Home Service were based on entirely different circumstances and facts than the decision on Associates.

G.

CONCLUSION

The Petition of Associates should be denied, since:

1. Granting it would require a violation of the rules of the Commission.
2. It would cause a general breakdown of the Rules which would deprive the Commission of effective authority to carry out its responsibility.
3. There is nothing set forth in the Petition of Associates to justify the action sought by Associates.

[112]

Respectfully submitted,

HOME SERVICE BROADCASTING
CORPORATION

By: /s/ Langan, Dempsey & Murphy
by: /s/ James M. Langan

* * *

It's attorneys

[Certificate of Service]

[114]

106

[114]

FLY, SHUEBRUK, BLUME and GAGUINE

New York, New York

* * *

April 6, 1966

* * *

RE: Home Service Broadcasting
Corporation
Natick, Massachusetts
BP-16,478

Dear Mr. Waple

Enclosed for filing, on behalf of Natick Broadcast Associates, Inc., are an original and nineteen copies of a Petition For Extension Of Time in this proceeding.

Please address any communications regarding this Petition to the undersigned at the New York office of this firm, 30 Rockefeller Plaza, New York, New York 10020.

Very truly yours,

/s/ Jerome S. Boros

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D.C. 20554

Enclosures (20)

[115]

PETITION FOR EXTENSION OF TIME

Natick Broadcast Associates, Inc., by its attorneys, petitions for an extension of time to April 22, 1966, inclusive, in which to respond to the Objections To Petition Of Natick Broadcast Associates, Inc. For Relief. This extension is needed because of the press of counsel's other commitments, including specifically the obligations to file findings in Boca Broadcasters, Inc. and Southington Broadcasters, on April 12th and 15th, respectively. Under the circumstances, "good cause" underlies and supports the requested extension.

Respectfully submitted

NATICK BROADCAST ASSOCIATES, INC.

By: /s/ Jerome S. Boros

* * *

Its Attorneys

April 6, 1966

[Certificate of Service]

[117]

108

[117]

FLY, SHUEBRUK, BLUME and GAGUINE
New York, New York

* * *

* * *

April 21, 1966

Re: Natick Broadcast Associates, Inc.
Natick, Massachusetts

Dear Mr. Waple

Enclosed for filing, on behalf of Natick Broadcast Associates, Inc., are an original and nineteen copies of a "Reply To 'Objections To Petition of Natick Broadcast Associates, Inc. For Relief'".

Please address any communications regarding this pleading to the undersigned at the New York office of this firm, 30 Rockefeller Plaza, New York, New York 10020.

Very truly yours,

/s/ Jerome S. Boros

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D.C. 20554

Enclosures (20)

[118]

REPLY TO "OBJECTIONS TO PETITION OF
NATICK BROADCAST ASSOCIATES, INC.
FOR RELIEF"

Natick Broadcast Associates, Inc. (hereinafter referred to as "Associates"), by its attorneys, replies to the Objection To Petition Of Natick Broadcast Associates, Inc. For Relief filed by Home Service Broadcasting Corporation (hereinafter referred to as "Corporation") in this proceeding.

1. Corporation's paper squarely and frankly argues (Opposition, par. 2)

"The issue here is not a question of what is in the public interest."

Corporation then expands on this theme, arguing that the Commission should slavishly and rigidly adhere to the letter of a Rule i.e., the consolidation rule (§1.227(b)(1)), which serves Corporation's private benefit, irrespective of the resultant adverse impact upon the overall public interest. Associates' contrary position

[119]

is that the Commission's Rules have vitality only insofar as they advance the Commission's *raison d'etre* i.e., "the larger and more effective use of radio in the public interest" (Communications Act, Section 303(g)).

2. In this connection, Associates respectfully submits that not only should every single Commission rule be construed in context, but also that all of the Commission's Rules should be read in pari materia so as to implement the "dominating general purpose" of the Communications Act. Securities and Exchange Commission v. C.M. Joiner Leasing Corporation, 320 US 344, 350-351 (1943). In other words, in passing on Associates' Petition, the Commission should not focus on the consolidation rule to the exclusion of the balance of the

Commission Rules e.g., the waiver rule (§1.3) - which expressly contemplates the Commission will waive its other rules, where such action would advance the fundamental purposes of the Communications Act.^{1/}

3. Associates submits that sound public policy here calls for grant of the Petition For Relief, because:

- a) The instant situation, which has no precedent in almost forty years of federal regulation of radio never is likely to arise again. Stated otherwise, the instant situation is sui generis and cannot create an undesirable precedent;

^{1/} Section 1.3, in pertinent part, provides:

"Any provision of the rules may be waived . . . if good cause therefor is shown."

Associates, however, does not concede that any violation of the Commission's Rules inheres in its application. (See pars. 5 and 6, infra).

- b) The instant situation is factually and equitably compelling in that no actual violation of the Commission's Rules, including the overlap rule, is presented by Associates' application. Thus the single question is whether Associates (which numbers no consulting engineers among its stockholders) should be defaulted because its technical advisor's presentation erroneously showed non-existent overlap of a de minimis nature;
- c) Non-consolidation of Associates' application will injure the Natick area populace, in that summary rejection of the application creates a Hobson's choice by depriving the Commission of the opportunity to select the better potential service.

4. The appropriateness of the Petition For Relief is underlined by Corporation's own "Conclusion". The tri-partite conclusion eloquently points up the hollowness of the reasons for refusing Associates the requested relief.

5. Corporation's first contention is:

"Granting . . . [equitable relief] would require a violation of the Rules of the Commission".

The fact is that acceptance of the application would comport with all Commission Rules. No overlap is involved in the application; indeed even as originally tendered the application apparently showed only de minimis overlap. This circumstance, coupled with the fact that the licensee of Station KYW, Philadelphia did not contest Associates' showing, clearly raised a substantive question as to whether overlap actually existed. At a minimum, the Commission was under a duty to afford Associates a hearing on this point rather than dismissing its application summarily. Cf. U.S. v. Storer Broadcasting Co. 351 U.S. 192 (1956), particularly

[121]

since the Commission has not been inflexible in its application of the overlap rule. Taft Broadcasting Company (KODA), FCC 66-134, released February 14, 1966 (" . . . the Commission expressly acknowledged its awareness of the probable existence of some situations in which rigid application of the new rules would obviously be inappropriate); Newcastle Broadcasting Corporation, FCC 65-995, released November 5, 1965; B & K Broadcasting Co., 6 RR. 2d 287 (1966); Suffolk Broadcasting Corp. (WLPM), Suffolk, Virginia (Public Notice - B, Report No. 5965, released April 20, 1966).

6. Associates' application likewise did not violate Section 1.227 (b)(i) of the Rules. Judged by precedent the application, at least was "substantially complete", as tendered, which is all that the Rule requires. And the Commission's July 2, 1965 letter did not dispute this completeness or put Associates on notice that, if it expanded its time, energy, and resources in collating data confirmatory of the non-existence of overlap, its application thereafter would be deemed unacceptable because of prior incompleteness. It was not until Associates, without amending its application, made a showing supportive of the original application that the Commission determined that this showing retroactively derogated from the application's completeness to such an extent as to require its dismissal. However, at any rate, Associates submits that its application was substantially more complete than the accepted application in Docket No. 12064 which was held to be "substantially complete" notwithstanding that no engineering data at all were included in the application.

^{2/} Then, as now, a "substantially complete" application was a sine qua non to acceptance of an application and entitlement to further

7. Corporation's second contention is:

"It [equitable relief] would cause a general breakdown of the Rules which would deprive the Commission of effective authority to carry out its responsibility."

This argument has surface allure but cannot withstand analysis. It suggests that a just solution to a knotty problem would open Pandora's box. However, this simply is not so. A non-rigid approach here would not involve a swarm of similar situations because the technical error here was not planned. It never is likely to arise again.

8. Corporation's third contention is:

"There is nothing set forth in the Petition Of Associates to justify the action sought by Associates".

However there are abundant and persuasive reasons for the Commission here, as elsewhere, to decide this case on the basis of fairness rather than harshness, namely:

- a) Relief will not set a precedent which will interfere with the orderly administration of the Commission's business, for relief will not encourage engineers deliberately to make technical errors to the detriment of their principals;
- b) Relief is consistent with the unforeseeability of the error here. "The risk reasonably to be perceived defines the duty to be obeyed . . ."^{3/} and it was neither foreseen nor foreseeable that Associates' consultant would depict a non-existent overlap.
- c) Relief will permit the Commission to select the applicant "which appears most likely to render the best service in the public interest". Report And Order (Docket No. 14304) FCC 63-213, Mimeo 3220, (par. 21), released March 8, 1963.

^{2/} cont. - processing e.g. receipt of a 309(b) letter.

^{3/} Palsgraf v. Long Island RR Co., 248 N.Y. 339, 162 N.E. 99 (1928)

- d) Relief will result in even-handed treatment of the parties, since Corporation was accorded the opportunity (denied to Associates) of amending its application to reduce its antenna height and cure overlap.^{4/}

To recapitulate, the Petition For Relief should be granted because:

Relief would not -

- a) Injure the Commission processes;
- b) Create an undesirable precedent;
- c) Prejudice any party (since Corporation has no statutory right, nor moral claim by victory by default).

Relief would -

- a) Avoid harshness;
- b) Be consistent with past practice;
- c) Comport with the overall public interest by giving the Commission an opportunity to enfranchise the party which will provide the better service.

4/ Corporation admits the disparity in treatment (Opposition, D 1):
"Home Service [sic] application was tendered [sic] September 23, 1964
and contained an error in calculation due to a simple oversight in
computing antenna efficiency. It had proposed radiating 175 mv/m/kw
but the proposed 230' antenna height would have radiated more nearly
190 mv/m/kw - and caused overlap.
... The Commission gave [sic] 20 days to modify the 230' antenna
proposal and this was done and the antenna height set at 140'."
(underscoring added).

[124]

Respectfully submitted

NATICK BROADCAST ASSOCIATES, INC.

By: /s/ Jerome S. Boros

* * *

Its Attorneys

April 21, 1966

[Certificate of Service]

[125]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Johnson not participating

1. The Commission has before it for consideration the above-captioned application; a "Petition for Relief" and "Erratum" thereto, submitted by the applicant ("Natick"); an opposition pleading, captioned, "Objections to Petition for Relief. . .," filed by Home Service Broadcasting Corporation ("Home Service"); and a "Reply . . ." pleading, filed by Natick.

2. In its "Petition for Relief," Natick requests, first, that the Commission set aside its Memorandum Opinion and Order of February 9, 1966,^{1/} returning the Natick application for the second time as unacceptable for filing; second, that it (i) accept the application as having been tendered on May 10, 1965; or (ii) waive Sections 1.227(b)(1) and 1.591(b) of the Commission's Rules insofar as they preclude acceptance of the Natick application and comparative consideration of it and the mutually exclusive application previously filed by Home Service;^{2/} or (iii) accept the application as having been filed August 2, 1965, nunc pro tunc as of May 10, 1965; and, third, that the Commission grant such other and further relief as is equitably appropriate.

3. The Natick application was originally tendered for filing on May 10, 1965 - the "cut-off" date of the Home Service application and hence the last day on which, pursuant to Sections 1.571(c), 1.227(b)(1) and (4) and 1.591(b) of the Rules, the Natick application could be accepted for filing.

^{1/} Natick Broadcast Associates, Inc. 2 FCC 2d 586, 6 RR 2d 824.

^{2/} File No. BP-16478; for a new standard broadcast station at Natick, Massachusetts, requesting 1060kc, 1kw, Day, Class II, accepted November 30, 1964.

Relief would not -

- a) Injure the Commission processes;
- b) Create an undesirable precedent;
- c) Prejudice any party (since Corporation has no statutory right nor moral claim by victory by default).

Relief would -

- a) Avoid harshness;
- b) Be consistent with past practice;
- c) Comport with the overall public interest by giving the Commission an opportunity to enfranchise the party which will provide the better service.

4/ Corporation admits the disparity in treatment (Opposition, D 1):
"Home Service [sic] application was tendered [sic] September 23, 1964 and contained an error in calculation due to a simple oversight in computing antenna efficiency. It had proposed radiating 175 mv/m/kw but the proposed 230' antenna height would have radiated more nearly 190 mv/m/kw - and caused overlap.
... The Commission gave [sic] 20 days to modify the 230' antenna proposal and this was done and the antenna height set at 140'."
(underscoring added).

[124]

Respectfully submitted

NATICK BROADCAST ASSOCIATES, INC.

By: /s/ Jerome S. Boros

* * *

Its Attorneys

April 21, 1966

[Certificate of Service]

[125]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Johnson not participating

1. The Commission has before it for consideration the above-captioned application; a "Petition for Relief" and "Erratum" thereto, submitted by the applicant ("Natick"); an opposition pleading, captioned, "Objections to Petition for Relief. . .," filed by Home Service Broadcasting Corporation ("Home Service"); and a "Reply . . ." pleading, filed by Natick.

2. In its "Petition for Relief," Natick requests, first, that the Commission set aside its Memorandum Opinion and Order of February 9, 1966,^{1/} returning the Natick application for the second time as unacceptable for filing; second, that it (i) accept the application as having been tendered on May 10, 1965; or (ii) waive Sections 1.227(b)(1) and 1.591(b) of the Commission's Rules insofar as they preclude acceptance of the Natick application and comparative consideration of it and the mutually exclusive application previously filed by Home Service;^{2/} or (iii) accept the application as having been filed August 2, 1965, nunc pro tunc as of May 10, 1965; and, third, that the Commission grant such other and further relief as is equitably appropriate.

3. The Natick application was originally tendered for filing on May 10, 1965 - the "cut-off" date of the Home Service application and hence the last day on which, pursuant to Sections 1.571(c), 1.227(b)(1) and (4) and 1.591(b) of the Rules, the Natick application could be accepted for filing.

^{1/} Natick Broadcast Associates, Inc. 2 FCC 2d 586, 6 RR 2d 824.

^{2/} File No. BP-16478; for a new standard broadcast station at Natick, Massachusetts, requesting 1060kc, 1kw, Day, Class II, accepted November 30, 1964.

[126]

The Commission, on July 2, 1965, returned Natick's application ^{3/} on the ground that it was unacceptable for filing. That action was based on the fact that Figure M-3 data, explicitly relied upon by Natick in its application, ^{4/} compelled the conclusion that the 0.005 mv/m groundwave contour of the Natick proposal would overlap the 0.1 mv/m groundwave contour of Class I co-channel Station KYW, Philadelphia, Pennsylvania, in violation of the provisions of Section 73.37(a) of the Rules. ^{5/} The correctness of that conclusion was later implicitly conceded by Natick to be correct. ^{6/}

4. Section 73.37(a), it should be noted, explicitly provides that (subject to certain exceptions not pertinent to this matter) "no application will be accepted for a new station . . . if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph . . ." (emphasis supplied). In its Report and Order promulgating that Section of the Rules, ^{7/} the Commission clearly stated that - for reasons fully elaborated therein - the overlap prohibitions specified in Section 73.37(a) would be strictly enforced, and would be waived only in the most exceptional circumstances. Natick's May 10, 1965, application tender was not accompanied by a request for waiver.

5. On August 2, 1965, Natick retendered its application and filed a "Petition for Reconsideration" accompanied by field measurement data demonstrating that no overlap of the proposed station's 0.005 mv/m contour and the 0.1 mv/m contour of Station KYW would occur. On the basis of this newly furnished data, Natick, in its petition for reconsideration, asked the Commission to set aside its action of July 2, 1965, and to accept the Natick application for filing as of May 10, 1965, for comparative consideration with the mutually exclusive Home Service application.

^{3/} Pursuant to Sections 0.281(n), and 73.37 of the Rules.

^{4/} Natick application, Exhibit E-1, p. 5: "FCC Map M-3 and the Canadian Provisional Ground Conductivity Map were used as the basis for conductivity values as appropriate."

^{5/} Even if Natick had not expressly relied upon Figure M-3, it was on notice that the Commission wanted actual field measurements, if possible (Section 73.183(a) of the Rules), and that, absent such measurements, "the groundwave intensity must be determined by means of the pertinent map of ground conductivity," i.e., Figure M-3 (Section 73.183(c) of the Rules). Paragraph (c) of Section 73.183 points out that "in areas of limited size or over a particular path," the Figure M-3 map is only generally accurate and therefore should be used "only when accurate and acceptable measurements have not been made." Despite this, Natick submitted no field measurements with its application tendered on May 10, 1965, but chose instead to rely upon Figure M-3 - and then erred in its calculations based upon that Figure.

^{6/} Natick "Petition for Relief," p. 6, n. 2, and appended Exhibit 4, an engineering statement prepared for Natick by its engineering consultants.

^{7/} Report and Order in Docket No. 15084, adopted July 1, 1964 (29 FR 9492, 2 RR 2d 1658).

[127]

6. On February 9, 1966, the Commission, by Memorandum Opinion and Order,^{8/} denied Natick's "Petition for Reconsideration" and returned its retendered application.

7. Natick's current "Petition for Relief," filed March 16, 1966, is essentially a petition for reconsideration of the Commission's February 9, 1966, denial of Natick's August 2, 1965, petition for reconsideration. The "relief" it requests is identical, in substantive effect, to that sought in its earlier petition. It offers no new facts or arguments in support of its request that could not readily have been presented earlier; and, indeed, included for the first time an implied admission that the Commission would have erred if, relying upon Figure M-3, it had not found an overlap of the 0.005 and 0.1 mv/m contours.^{9/}

8. Natick claims that a grant of its request is required on "several distinct grounds." As its primary argument, Natick asserts that, despite all appearances to the contrary, its application as submitted on May 10, 1965, did in fact comply with the prohibited overlap provisions of Section 73.37(a) of the Rules; and that such actual compliance should be determinative. This contention is incorrect. Natick's application as submitted in May 1965 left the Commission with no choice, under its rules, but to return that application as unacceptable for filing: The Figure M-3 data which Natick chose to rely upon -- despite the Commission's clearly expressed preference for actual field measurements -- compelled a finding of prohibited overlap; and that finding necessitated return of the application as unacceptable for filing. Its legal rights are in no way enhanced by the fact that, after the "cut-off" date, it retendered the application, belatedly "reinforced" by field measurement data. Nor is it entitled -- either as a matter of equity, or in consideration of the public interest -- to a grant of its request for special treatment of the application simply because it eventually, but too late for consideration under the Rules, submitted field measurement data rebutting the data upon which it had previously relied. Natick is not entitled to special consideration as a matter of equity, because the plight it complains of is one of its own making; and public interest considerations can hardly be said to weigh in favor of the procedural disarray that would result from acceptance of the proposition that evidence which is untimely filed without good cause should be considered after a matter is closed.

^{8/} Supra n. 1

^{9/} Natick contends ("Petition for Relief," par. 15) that the overlap found thereby "was de minimis and . . . should have been disregarded."

[128]

9. Natick suggests that failure to grant its request would be discriminatory. It states that the Commission previously gave Home Service an opportunity to clarify its mutually exclusive application in order to avoid a finding of prohibited overlap, and should have accorded a like opportunity to Natick. The facts of the matter are as follows: The Home Service application was originally tendered on September 23, 1964. On November 23, 1964, the Commission advised Home Service by letter that the radiation efficiency of its proposed antenna, if not restricted to the 175 mv/m/kw specified in the application, would result in an overlap of the proposed station's 0.005 mv/m contour with the 0.1 mv/m contour of Station KYW, Philadelphia; and that, under the provisions of Section 73.37(a) of the Rules, such overlap would render its application unacceptable for filing. The letter further advised Home Service that, "Since . . . [it] did not clearly indicate whether the radiation would be restricted to a value of 175 mv/m, further action on the application would be withheld for 20 days "to permit consideration of the problem noted herein."^{10/} On November 30, 1964, Home Service mooted the ambiguity by submitting an amendment reducing the proposed antenna height. The Home Service application was then accepted for filing -- not nunc pro tunc, but as of the date of tender of the amendment.^{11/} Unlike Home Service, Natick tendered its application on the very last day on which it could be accepted for filing. Why it did so is a matter for conjecture; but it is perfectly clear that the consequence of Natick's having tendered on the "cut-off" date is that by so doing it deprived itself of any opportunity, under the Rules, to cure a serious defect in the application that made it unacceptable for filing. Having placed itself in this position, Natick does not have good ground for complaint.

10. Natick next contends that the prohibited overlap found by the Commission on the basis of Figure M-3 data was "de minimis and not substantial," and that the Commission should therefore have disregarded it and accepted the application for filing. In support of this contention,

Natick has appended to its "Petition for Relief" a new engineering exhibit, prepared by an engineering consultant other than the one which it originally retained, which asserts that the area of prohibited overlap to be found by reliance upon Figure M-3 data is "approximately 30 miles long and penetrates the land area a maximum of one mile." This argument is rejected for the following reasons: First, the Commission's own study indicated that the area of prohibited overlap over land was several times larger than indicated by

^{10/} Home Service, in its application as originally tendered, clearly specified a radiation value of 175 mv/m, and that value of radiation did not involve a contravention of Section 73.37(a). The application did not however, indicate how radiation would be so restricted, and the purpose of the Commission's letter was essentially to obtain clarification of that ambiguity. In contrast with this, the Natick application specified a value of radiation which, on the basis of the data submitted, unambiguously compelled the conclusion that the proposal therein contravened Section 73.37(a) and hence was unacceptable.

^{11/} If this were not the case, the file number assigned to Home Service's application would have been lower.

Natick's latest exhibit, and could hardly be viewed as insubstantial. Second, and more important, Natick's argument ignores the fact that the overlap prohibitions set forth in Section 73.37(a) of the Rules were expressly promulgated as "go-no-go" separation standards, intended to be strictly construed and applied.

11. Natick then contends that -- since the amount of overlap found by the Commission was de minimis, and since Natick had claimed from the outset that it was non-existent -- the Commission should have at least designated the application for hearing to determine the extent of overlap if any, and, if necessary, whether a waiver should be granted. It acknowledges that it did not request a waiver, but claims that this does not matter since the Commission has an affirmative duty to waive its rules on its own initiative under appropriate circumstances. United

Broadcasting Co., Inc., 5 RR 2d 684 (1965), is cited by Natick as a recent case in which the Commission waived comparable prohibited overlap provisions and accepted an application nunc pro tunc in order that it might be comparatively considered with a previously filed, mutually exclusive application.

12. This argument, too, is without merit. In the first place, the prohibited overlap found by the Commission, on the basis of the Figure M-3 data relied upon by the applicant, was so extensive as to remove any reasonable doubt as to the invalidity of Natick's claim that no overlap existed at all. In the second place, no adequate reasons have yet been adduced by Natick for a waiver of Section 73.37(a) in this case, in the face of the Commission's clearly expressed intention to waive it only in the most exceptional circumstances.^{12/} Finally, Natick's citation of United Broadcasting Co., Inc., is -- in view of the facts of that case -- singularly inappropriate. In United Broadcasting, the Commission, notwithstanding proposed new prohibited overlap, waived Section 73.37 in order to accept an application for a new station mutually exclusive with an existing station's renewal where the new-station applicant was able to show that, on a net basis, a grant of the new-station proposal would result in less prohibited overlap than would continued operation by the existing station. Thus, in that case, an eventual grant of the new-station proposal would have resulted in greater adherence to the Section 73.37 criteria.

^{12/} Natick claims that the Home Service application "is not likely to be granted" and that -- absent comparative consideration of the Natick and Home Service applications -- Natick, Massachusetts, "is likely to be bereft of a station indefinitely if not for all time." These assertions must be characterized as mere speculation, particularly in view of the fact that any denial of the Home Service application would make an application by Natick, in proper form, acceptable for filing.

[130]

13. Natick's next contention is that its application, as tendered on May 10, 1965, should have been accepted for filing on the ground that it was "substantially complete." This contention ignores the fact that, even if the Natick application was substantially complete, it nonetheless was rendered unacceptable for filing by the fact that its contents left the Commission with no choice but to conclude that it violated an application acceptance standard which was wholly unambiguous and intended to be strictly enforced.^{13/}

14. Finally, Natick contends that its consulting engineer, rather than any of the Natick principals, was responsible for the decision to rely on Figure M-3 data rather than actual field measurements; and that it would therefore be inequitable to make Natick suffer the consequences.^{14/} It claims that, under these circumstances, denial of its request for comparative consideration of the Natick and Home Service applications would be harmful both to Natick and to the community it proposes to serve, and would not provide any offsetting benefits. In particular, Natick contends, denial of its request would not have a deterrent effect upon the submission of "superficially erroneous" applications, since "No applicant instructs its engineers to err," and "Every applicant anticipates that, if it selects engineering consultants, who are in practice before the Commission, they will seek to make an acceptable showing, both superficially and substantially." This argument is clearly without merit. If applicants were to be saved from the consequences of defects in their applications, merely because the defective portions of their applications were prepared by engineering consultants rather than themselves, it is reasonable to assume that -- as in Gresham's law -- engineering work of poorer quality would tend to drive out costlier but more carefully prepared engineering submissions.

^{13/} Supra par. 4.

14/ In support of this contention, Natick cites B.J. Hart, 20 RR 301 (1960), in which an application had been tendered on the "cut-off" date, and had been returned as unacceptable because it lacked the applicant's verified signature. The applicant had then retendered its application, signed and verified, and accompanied by a request for nunc pro tunc acceptance as of the date of original tender. The Commission noting, inter alia, that "only the inadvertence of the petitioner's attorney precluded compliance with the Commission's filing procedure by the required date" -- granted the request. However, the facts in the present matter are fully distinguishable from those in B.J. Hart. The defect in the Hart case was merely one of form -- the absence of a signature. In the case before us, the defect was not one of mere form, but of critical substance i.e., the application as tendered on May 10, 1965, compelled the conclusion that the engineering proposal involved prohibited overlap of contours.

[131]

15. The Commission has fully considered all comments submitted in support of waiver of the Rules, but, for the reasons set forth above, concludes that the facts asserted by Natick, if true, are not sufficient to warrant a waiver. On the basis of the information before us, we do not consider it appropriate to consider in a hearing whether a waiver should be granted. Only those cases which set forth allegations of fact sufficient, if true, to justify waivers need be accorded such treatment. The burden is on the applicant to meet this threshold test. United States v. Storer Broadcasting Co., 351 U.S. 1923, 13, 2161 (1956).

In view of the foregoing, IT IS ORDERED, That the applicant's "Petition for Relief" IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

Adopted: February 1, 1967
Released: February 8, 1967

cc: Natick Broadcast Associates, Inc.
Jerome S. Boros
Langan, Dempsey and Murphy
Home Service Broadcasting Corporation



[132]

FLY, SHUEBRUK, BLUME AND GAGUINE

* * *

1612 K Street, N. W.
Washington, D. C. 20006
May 29, 1967

* * *

Re: Natick Broadcast Associates, Inc.
v. FCC, Case No. 20,834

Dear John

As I indicated to you during our conversation this afternoon, I am transmitting herewith the original of the Natick Broadcast Associates, Inc. application which is to be included in the record of the case now pending before the Court of Appeals. Please note that portions thereof are already included in the record.

It would be greatly appreciated if the supplemental index to the record could be prepared as soon as possible so that proper pagination to the supplemental materials can be included in our brief, currently being finalized. When the supplemental index is compiled, please let me know promptly so that I can inform the printer accordingly.

Sincerely

FLY, SHUEBRUK, BLUNE
AND GAGUINE

By /s/ Howard Jay Braun

John Conlin, Esq.
Associate General Counsel
Federal Communications Commission
Washington, D. C. 20554

By hand w/encl.

ORIGINAL

100

FCC Form 301
Nov. 1962

Section I

FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR AUTHORITY TO CONSTRUCT A NEW BROADCAST
STATION OR MAKE CHANGES IN AN EXISTING BROADCAST STATION

INSTRUCTIONS

A. This form is to be used in applying for authority to construct a new AM (standard), commercial FM (frequency modulation), or television broadcast station, or to make changes in existing broadcast stations. This form consists of this part, Section I, and the following sections:

Section II, Legal Qualifications of Broadcast Applicant

Section III, Financial Qualifications of Broadcast Applicant

Section IV, Statement of Program Service of Broadcast Applicant

Section V-A, Standard Broadcast Engineering Data

Section V-B, FM Broadcast Engineering Data

Section V-C, Television Broadcast Engineering Data

Section V-G, Antenna and Site Information

B. Prepare three copies of this form and all exhibits. Sign one copy of Section I. Prepare two additional copies (a total of five) of Section V-G and associated exhibits. File all the above with Federal Communications Commission, Washington, D. C. 20554.

C. Number exhibits serially in the space provided in the body of the form and list each exhibit in the space provided on page 2 of this Section. Show date of preparation of each exhibit, antenna pattern, and map, and show date when each photograph was taken.

D. The name of the applicant stated in Section I hereof shall be the exact corporate name, if a corporation; if a partnership, the names of all partners and the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his office; and the name of the association. In other Sections of the form the name need be only sufficient for identification of the applicant.

E. Information called for by this form which is already on file with the Commission need not be repeated. Information now on file in another application of FCC Form 301 filed by or on behalf of this applicant; (2) the information is identified fully by reference to the file number (if any, the FCC form number, and the filing date of the application or other form containing the information on the page of paragraph referred to, and (3) after making the reference, the applicant states: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will, hereafter, in its entirety, be open to the public.

F. This application shall be signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer, if the applicant is a corporation; by a member who is an officer, if the applicant is an unincorporated association; by each duly elected or appointed official as may be competent to do so under the laws of the applicable jurisdiction, if the applicant is an eligible government entity; or by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States. The attorney shall, in the event he signs for the applicant, separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

G. Before filling out this application, the applicant should familiarize himself with the Communications Act of 1934, as amended, Parts 1, 2, 3 and 17 of the Commission's Rules and Regulations and the Standards of Good Engineering Practice.

H. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

File No. BP

Name and post office address of applicant (See Instruction D)

Natick Broadcast Associates, Inc.
c/o Edward F. Perry, Jr.
203 Pond Street
Natick, Massachusetts

Send notices and communications to the following-named person at the post office address indicated if different than above

Edward F. Perry, Jr. at above address
cc: Fly, Shuebruk, Blume and Gaguine *

1. Requested facilities

Frequency	Channel No.	Power in kilowatts		Minimum hours operation daily
		Night	Day	
1060 kc	-	-	1 kw	11 hrs

Hours of operation

1985	Sharing with (Specify Stations)	Other (Specify)
Daytime only X	-	-
Limited	-	-

Type of Station (as Standard, FM, Television)

Standard

Station location

City	State
Natick	Massachusetts

2. If authority to make changes in an existing station is requested

Not Applicable

(a) Present facilities

Frequency	Call	Channel No.	Power in kilowatts		Minimum hours operation daily
			Night	Day	
Unlimited					
Daytime only					
Limited					

Hours of operation

Unlimited	Sharing with (Specify Stations)	Other (Specify)
Daytime only	-	-
Limited	-	-

Station location

City	State

(b) If this application is for changes in an existing authorization, complete Section I and any other sections necessary to show all substantial changes in information filed with the Commission in prior applications or reports. In the spaces below check Sections submitted herewith and as to Sections not submitted herewith refer to the prior application or report containing the requested information in accordance with Instruction E. (If contemplated expenditures are less than \$5,000, complete paragraph 1 of Section III only. Section IV is not required for applications for minor changes not involving change in power, change in frequency, change in hours of operation, or moving from city to city.)

Section No. Para. No. Reference (File or Form No. and Date)

☐ Section II☐ Section III☐ Section IV☐ Section V

Have there been any substantial changes

Yes ☐ No ☐

in the information incorporated in this application by reference in this paragraph?

3. If this application is contingent on the grant of another pending application, state name of other applicant and file number of other application.

Not Contingent

*30 Rockefeller Plaza
New York, New York 10020

FCC Form 301

Section I, Page 2

THE APPLICANT hereby waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934).

THE APPLICANT represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

THE APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all the exhibits are a material part hereof and are incorporated herein as if set out in full in the application.

CERTIFICATION

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed and dated this 16th day of May, 1965

EFFECTIVE JANUARY 1, 1964, INCLUDE FILING FEE WITH THIS APPLICATION. SEE PART 1 OF FCC RULES FOR AMOUNT OF FEE.

Natick Broadcast Associates, Inc.

(NAME OF APPLICANT)

By Edward F. Perry, Jr.
(SIGNATURE)

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT. U. S. CODE, TITLE 18, SECTION 1001.

Title President

If applicant is represented by legal or engineering counsel, state name and post office address: **Eng: Barkley & Dexter Laboratories, Inc., 50 Frankfort Fitchburg, Mass., Legal: Fly, Shuebruk, Blume & Gagliardi, 30 Rockefeller Plaza, New York, N.Y.**

EXHIBITS furnished as required by this form:

Exhibit No.	Section and Para. No. of Form	Name of officer or employee (1) by whom or (2) under whose direction exhibit was prepared (show which)	Official title
1	II-3	Leon M. Fox (1)	Clerk
2	II-5, 19, 21	Leon M. Fox (1)	Clerk
3	II-22(d)	Leon M. Fox (1)	Clerk
4	III-1(c), 2(a)(b), 3, 4	Edward F. Perry (2)	President
5	IV-1(b), 2(b), 10, 12	Edward F. Perry (2)	President
6	IV-7	Edward F. Perry (2)	President
E-1	V	Barkley & Dexter Laboratories Inc. (1)	Consulting Engineers

10020

Broadcast Application	FEDERAL COMMUNICATIONS COMMISSION	Section II
LEGAL QUALIFICATIONS OF BROADCAST APPLICANT	Name of Applicant Natick Broadcast Associates, Inc.	
INSTRUCTIONS		
<p>As used in paragraphs 6 to 10 and 19 to 21, both inclusive, of Section II of this form, the words "party to this application" have the following meanings, respectively: In case of an individual applicant, the applicant. In case of a partnership applicant, all partners, including limited and silent partners. In case of a corporate applicant, all officers, directors, stockholders of record, persons owning the beneficial interest in any stock, subscribers to any stock, and persons who voted any of the voting stock at the last stockholders meeting. In case of any other applicant, all executive officers, members of the governing board, and owners or subscribers to any membership or ownership interest in the applicant. In case of an application for assignment or transfer, Section II should be completed only for the assignee or transferee, showing the ownership as it will be after the assignment or transfer has taken place. (Note: If the applicant considers that to furnish a complete answer to the paragraphs referred to would be an unreasonable burden, it may request the Commission for a waiver of the strict terms of this requirement.)</p>		
<p>1. Applicant is (Check one): An individual <input type="checkbox"/>, a general partnership <input type="checkbox"/>, a limited partnership <input type="checkbox"/>, a corporation <input checked="" type="checkbox"/>, an unincorporated association <input type="checkbox"/></p>		
<p>2. If applicant is not an individual, give the State, District, Territory or Possession under the laws of which it is organized. Massachusetts</p>		
<p>3. Submit as Exhibit No. 1 copies, one of which must be properly certified, of (a) if applicant is a general or limited partnership, the partnership agreement; (b) if applicant is a corporation, the articles of incorporation (or charter) and the by-laws, certified by the Secretary of State or other appropriate official; (c) if applicant is an unincorporated association, the articles of association or other legal instrument under which applicant is organized showing the purpose thereof, and the bylaws, if any. In each case, submit properly certified copies of all amendments.</p>		
<p>4. If applicant is a corporation or an unincorporated association, indicate specifically by reference to page and paragraph of the articles of incorporation or of association, the charter powers relied upon by the applicant to show that it is legally empowered to construct and operate the proposed station. If the articles of incorporation do not specifically authorize kind of business sought to be entered into, attach a statement from Secretary of State or other officer interpreting the language relied upon. Exhibit 1 (Part A) pp. 1-2</p>		
<p>5. Complete Tables I and II on pages 3 and 4. See Exhibit 2</p>		
CITIZENSHIP AND OTHER STATUTORY REQUIREMENTS (See instructions above)		
<p>6. If applicant is an individual, is the applicant a citizen of the United States; or, if applicant is not an individual, are all parties to this application citizens of the United States? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If the answer is "No", state the name and citizenship of each person who is not a citizen of the United States.</p>		
Not Applicable		
<p>7. Is United States citizenship of any party to this application claimed by reason of naturalization? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If so, state the name of such party, the date and place of issuance of final certificate of naturalization, certificate number, and name and location of court authorizing issuance of same.</p>		
Not Applicable		
<p>8. Is United States citizenship of any party to this application claimed by reason of naturalization of a parent? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If so, state the name of such party, the name of the parent to whom the final certificate was issued, the age of the party to this application at the time the certificate was issued, and any additional facts relied on to establish citizenship, in addition to the information required by Paragraph 7 hereof.</p>		
Not Applicable		
<p>9. (a) Is applicant or any party to this application a representative of an alien or of a foreign government? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> (b) If applicant is a corporation, is more than 20 percent of the capital stock owned of record or may it be voted by aliens or their representatives, or by a foreign government or a representative thereof, or by any corporation organized under the laws of a foreign country? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> (c) If applicant is a corporation and is controlled by another corporation or corporations, is more than 25 percent of the capital stock of such controlling corporation or corporations owned of record or may it be voted by aliens, their representatives, or by any corporation organized under the laws of a foreign country? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> (d) If the answer to any of the foregoing parts of this paragraph is "Yes", submit as Exhibit No. Not Applicable a full disclosure concerning the persons and matters involved.</p>		
<p>10. (a) Has applicant or any party to this application had a station license revoked by order or decree of any Federal court? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> (b) Has the applicant or any party to this application been found guilty by a Federal court of the violation of the laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> (c) Has the applicant or any party to this application been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize radio communications, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition? (See Section 313 of the Communications Act of 1934) Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> (d) Has the applicant or any party to this application been found guilty by any court of any felony or other crime involving moral turpitude, or of the violation of any State, territorial or local law relating to unlawful lotteries, restraints and monopolies and combinations, contracts or agreements in restraint of trade, or of using unfair methods of competition? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/></p>		

Broadcast Application		LEGAL QUALIFICATIONS				Section II, Page 2	
10. (Continued)							
e. Is there now pending in any court or administrative body against the applicant or any party to this application any action involving any of the matters referred to in Paragraphs 10a, b, c, and d above?						Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
f. Have voluntary proceedings in bankruptcy been instituted by, or have involuntary proceedings in bankruptcy ever been brought against applicant or any party to this application?						Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
g. Are there outstanding any unsatisfied judgments or decrees against applicant or any party to this application?						Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
h. If the answer to any of the foregoing parts of this paragraph is "Yes", submit as Exhibit No. a full disclosure concerning the persons and matters involved, identifying the court and the proceeding (by dates and file numbers), stating the facts upon which the proceeding was based or the nature of the offense committed, and the disposition of the matter.							
Not Applicable							
CORPORATE APPLICANT							
INSTRUCTION: If applicant is a corporation, answer paragraphs 11 to 16, inclusive.							
11. Stock of corporation							
(a) Class of stock	(b) Par value	(c) Vote per share	(d) No. shares authorized	(e) No. shares issued	(f) No. shares subscribed	(g) Total number stockholders	
Common	No Par	1	2,000	2,000	-	8	
12. At the last meeting of stockholders were any shares of stock voted by proxy? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>							
If so, state							
Class of stock	No. of shares	Meeting date	No. voted by stockholders in person	No. voted by proxy	Name of each proxy voting 1 percent more of each class		
Not Applicable							
13. In connection with the stockholders and stock subscribers named in Table I to this form, is the beneficial owner of the stock a person other than the owner of record or subscriber? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>							
If so, submit as Exhibit No. a statement of (a) the name of the owner of record, or subscriber, (b) the name of the beneficial owner, (c) the conditions under which the owner or subscriber holds any votes or has subscribed for such stock, and (d) a copy of any contract or other instrument relating to such conditions.							
Not Applicable							
14. Has applicant any other obligations or securities authorized or outstanding which bear voting rights either absolutely or upon any contingency? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>							
If so, submit as Exhibit No. a statement of (a) the nature of such securities, (b) the face value or par value, (c) the number of units authorized, (d) the number of units issued and outstanding, (e) the number of units, if any, proposed to be issued, (f) the conditions or contingency upon which such securities may be voted, and (g) facts showing whether or not such securities have been voted or entitled to be voted in the past 5 years and at the present time.							
Not Applicable							
15a. Is applicant corporation, directly or indirectly, controlled by another corporation or legal entity? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>							
b. Is 10 percent or more of the stock of applicant corporation owned by another corporation or legal entity? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>							
c. If the answer to any of the foregoing parts of this paragraph is "Yes", state below the name of such other corporation or legal entity, and submit as Exhibit No. (a) a statement of how such control, if any, exists and the extent thereof, and (b) with respect to such other corporation or legal entity, a statement answering paragraphs 11 to 15, inclusive and the information requested in Tables I and II of this section.							
Not Applicable							
16. Is the corporation or legal entity named in paragraph 15 in turn a subsidiary? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>							
If so, state below the name of such other parent corporation or legal entity, and submit as Exhibit No. a statement for each such corporation or legal entity answering paragraphs 11 to 16, and the information requested in Tables I and II of this section, to and including the organization having final control.							
Not Applicable							
UNINCORPORATED ASSOCIATION (OR OTHER LEGAL ENTITY)							
Not Applicable							
INSTRUCTION: If applicant is an unincorporated association or a legal entity other than an individual, partnership or corporation, answer paragraphs 17 and 18.							
17. State the nature of the applicant, cite the laws under which organized, and submit as Exhibit No. a copy of such laws.							
18. State the total number of members or persons holding any ownership interest in the applicant.							

Section II, Page 3

LEGAL QUALIFICATIONS

Broadcast Application

Table 1

INSTRUCTIONS: If applicant is an individual, fill out columns (a) and (b) stating (a) applicant's name and residence (home) address or addresses, and (b) applicant's date and place of birth. If applicant is a partnership, fill out columns (a), (b), (c) and (d), stating as to each general or limited partner (including silent partners): (a) name and residence (home) address or addresses, (b) date and place of birth, (c) nature of partnership interest (i.e. general or limited), and (d) percent of ownership interest. If applicant is a corporation or an unincorporated association, fill out all columns, giving the information requested as to all officers, directors and members of the governing board. In addition, give the information as to all stockholders, stock subscribers, holders of membership certificates or other ownership interests, in which case furnish the information as to all persons owning 3 percent or more of the capital stock, subscribers or holders of membership certificates or other ownership interests, and all persons who voted 3 percent or more of such stock or interest at the last meeting of stockholders, members or owners. If applicant is a membership or ownership interest, and all persons who voted 3 percent or more of such stock or interest at the last meeting of stockholders, members or owners. If applicant is a corporation or unincorporated association, state in column (d) the percent of voting stock or interest held, (d) whether or not the individual is a director or member of the governing board (Yes or No), (e) the number of shares of stock of all classes or membership interests held, and (f) the number of shares of stock of all classes or membership interests subscribed for.

NAME AND RESIDENCE (home) ADDRESS(es) (a)	DATE AND PLACE OF BIRTH (b)	NATURE OF PARTNERSHIP INTEREST OR OFFICE HELD (c)	DIRECTOR OR MEMBER OF GOVERNING BOARD (Yes or No) (d)	NO. SHARES OF EACH CLASS OF STOCK OR NO. MEMBERSHIP OR OWNERSHIP INTERESTS		PERCENT OF OWNERSHIP OR PERCENT OF VOTING STOCK OR MEMBERSHIP (f)
				Now held (e)	Subscribed (f)	

SEE EXHIBIT 2

Section II, Page 4		
LEGAL QUALIFICATIONS		
Table II		
BUSINESS AND FINANCIAL INTERESTS		
<p>INSTRUCTIONS: The purpose of Table II is to obtain information concerning the occupation, business, and financial interests, at the present time and during the past 5 years, of the applicant and of each party to this application named in Table I. In column (a) list the names of all individuals or organizations listed in column (a) of Table I. In column (b) state the principal occupations and businesses in which each party named is engaged at the present time or has been engaged at any time during the past 5 years, and, in addition, state any other business or financial enterprise in which each party has now or within the past 5 years has had either a 25% or greater interest or any official relationship. In each case, state in column (b) the firm name, the principal place of business, and the nature of the business engaged in. In case the party has been associated in business with any other person or persons, state the name of each such other person. In column (c) state the extent and nature of the interest, official relationship, employment, or association, giving approximate dates.</p>		
(a) Name of party	(b) Firm name, principal place of business, and nature of business	(c) Extent and nature of interest, etc. (giving dates)
S E E E X H I B I T 2		

Broadcast Application		LEGAL QUALIFICATIONS		Section 11, Page 5
OTHER BROADCAST INTERESTS (See instructions on page 1)				
19. Does applicant or any party to this application have now, or has applicant or any such party had, any interest in, or connection with, the following:				
(a) Any standard, FM, or television broadcast station?			Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
(b) Any application pending before the Commission?			Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
(c) Any application which has been denied by the Federal Communications Commission?			Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
(d) Any broadcast station the license of which has been revoked?			Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
If the answer to any of the foregoing parts of this paragraph is "Yes", show particulars in the table below:				
(1) Name of party having such interest	(2) Nature of interest or connection (giving dates)	(3) Call letters of station or file number of application	(4) Location	
SEE EXHIBIT 2				
20. Is the applicant or any party to this application controlled, directly or indirectly, by any person who has any interest in or connection with any broadcast station or application of the type referred to in Paragraphs 19(a) to (d)? If so, submit as Exhibit No. _____ giving full particulars.			Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
21. (a) Are any of the parties to this application related to each other (as husband, wife, father, mother, brother, sister, son or daughter)?			Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
(b) Does any member of the immediate family (i.e., husband, wife, father, mother, brother, sister, son or daughter) of any party to this application have any interest in or connection with any other broadcast station or pending application?			Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
(c) If answer is "Yes" to either (a) or (b) above, state (a) names of the persons, (b) relationship, (c) nature and extent of such interest or connection, (d) name of applicant or call letters of station, (e) file number of application, and (f) location of station or proposed station involved.				
See Exhibit 2				
OWNERSHIP AND CONTROL OF STATION				
22. The Commission is seeking in this paragraph information as to contracts and arrangements now in existence, as well as any arrangements or negotiations, written or oral, which relate to the present or future ownership, control or operation of the station; the questions must be answered in the light of this instruction.				
(a) Applicant's control over the station is to be by reason of: (Indicate by check mark)				
Ownership <input checked="" type="checkbox"/> Lease <input type="checkbox"/> Other authority <input type="checkbox"/>				
(b) Name and address of the owner of the station (if other than the applicant)			(c) Will the applicant have and maintain absolute control of the station, its equipment, and operation, including complete supervision of the program to be broadcast? If "No", explain	
Applicant will be owner				
(d) Are there any documents, instruments, contracts or understandings relating to ownership, management, use or control of the station or facilities, or any right or interest therein?			Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
If so, attach as Exhibit No. 3 copies of all such documents, instruments or contracts and state the substance of oral contracts or understandings.				

Broadcast Application		FEDERAL COMMUNICATIONS COMMISSION		Section III	
FINANCIAL QUALIFICATIONS OF BROADCAST APPLICANT		Name of Applicant Natick Broadcast Associates, Inc.			
The Commission is seeking in the questions that follow information as to contracts and arrangements now in existence, as well as any arrangements or negotiations, written or oral, which relate to the present or future financing of the station; the questions must be answered in the light of this instruction.					
1. a. Give estimated initial costs of making installation for which application is made. If performed under a contract for the completed work, the facts as to such contract must be stated in lieu of estimates as to the several items. In any event, the cost shown must be the costs in place and ready for service, including the amounts for labor, supervision, materials, supplies and freight. Cost items such as professional fees, mobile equipment, non-technical studio furnishings, etc. should be included under "Other Items" below.					
Transmitter proper including tubes \$ 5,718.00		Antenna system, including antenna-ground system, coupling equipment, transmission line \$ 14,483.00		Frequency and modulation monitors \$ 2,944.00	Studio technical equipment, microphones, transcription equipment, etc. \$ 6,270.00
Acquiring land \$ 8,000.00	Acquiring, remodeling, or constructing buildings \$ 2,000.00	Other items itemize Legal, eng., misc. contingencies \$ 50,000.00	Total \$ 116,500	Give estimated cost of operation for first year \$ 106,260.00	Give estimated revenues for first year \$ 112,000.00
b. State the basis of the estimates in (a) above. Information furnished by equipment manufacturers, consulting engineers, attorneys and Applicant's investigations and knowledge of its stockholders.					
c. The proposed construction is to be financed and paid for in the following manner (including specified statements as to the approximate amount to be met and paid for from each source.) The financial plan should provide for any additional construction costs should the actual cost exceed the original estimated cost, and also for the early operation of the station in the event operating expenses should exceed operating revenues: See Exhibit 4					
Existing Capital \$	New Capital \$	Loans from banks or others \$	Profits from existing operations \$	Donations \$	Credit, deferred payments, etc. \$
Other sources (specify) \$					
2. a. Attach as Exhibit No. 4 a detailed balance sheet of applicant as at the close of a month within 90 days of the date of the application showing applicant's financial position. If the status and composition of any assets and liabilities on the balance sheet are not clearly defined by their respective titles, attach as Exhibit No. schedules which give a complete analysis of such items.					
b. Attach as Exhibit No. 5 a statement showing the yearly net income, after Federal income tax, for each of the past 2 years, received by applicant from the various types of activity in which he was engaged or from any other source.					
3. Furnish the following information with respect to the applicant only. If the answer is "None" to any or all items, specify so state:					
a. Amount of funds on deposit in bank or other depository			b. Name and address of the bank in which deposited		
c. Name and address of the party in whose name the money is deposited See Exhibit 4					
d. Conditions of deposit (in trust, savings, subject to check, on time deposit, who may draw on account and for what purpose, or other condition)					
e. Whether the funds were deposited for the specific purpose of constructing and operating the station					

FUNDS, PROPERTY, ETC., TO BE FURNISHED BY PARTIES CONNECTED WITH APPLICANT OR BY OTHERS

4. Submit as Exhibit No. **4** a statement setting forth the full name and address of each person (whether or not connected with applicant, but including partners, shareholders, or subscribers to capital stock of the applicant) who has furnished or will furnish funds, property, service, credit, loans, donations, assurances, or other things of value, or will assist in any other manner in financing station. For each person (other than financial institutions or equipment manufacturers) who has furnished or will furnish one percent or more of the total of things of value excluding loans from financial institutions and equipment credit supply the additional information requested in a to g below. For financial institutions or equipment manufacturers, supply the additional information requested in h below. ("Furnish" or "furnished" as herein used includes payments for capital stock or other securities, loans and other credits, gifts and any other contributions.)
- a. A description of that which has been or will be furnished by each person showing the value thereof and any encumbrances thereon.
 - b. If the funds or other things of value proposed to be used for the purchase or construction of the station have been acquired for that specific purpose, indicate the source or sources thereof.
 - c. For each person who has agreed to furnish funds, purchase stock or extend credit, submit a verified copy of the agreement by which each person is so obligated, showing the amount, terms of repayment, if any, and security, if any.
 - d. For each person (except financial institutions) who has agreed to furnish funds or purchase stock, but who has not already done so, submit a balance sheet or, in lieu thereof, a financial statement showing all liabilities and containing current and liquid assets sufficient in amount to meet current liabilities (including amounts payable during the next year on long term liabilities) and, in addition, to indicate financial ability to comply with the terms of the agreement. The balance sheets submitted should segregate receivables and payables to show the amounts due within one year and those due after one year. The term current and liquid assets refers to items such as cash, or loan value of insurance, government bonds, stocks listed on major exchanges etc., or other assets which may be readily used or converted to provide funds to meet the proposed commitments. Assets such as accounts receivable, which result from normal operation of a business, stocks of close corporations, timberland, building lots, etc., are not considered as a readily available source of funds without a specific showing that such assets will provide funds to meet proposed commitments. If a balance sheet does not clearly indicate liquid assets sufficient in amount to meet current liabilities and in addition, proposed commitments, it should be supplemented by a statement showing the manner in which non-liquid assets will provide such funds. Any financial statement furnished in lieu of a balance sheet should, likewise, describe assets relied on to provide funds, in sufficient detail to permit a determination of current position and should be more than a mere statement of total assets and total liabilities or a statement of net worth.
 - e. As to each person who has or has had in the past 5 years an interest of 25% or more in any business or financial enterprise or any official relationship to any business or financial enterprise, give full and complete disclosure of the enterprise, the name and principal place of business, the character of business engaged in, and the nature and extent of the interest in or relationship to such business.
 - f. Net-income after Federal income tax, received for the past two years by each person who has furnished or will furnish funds, property, service, credit, loans, donations, assurances, or other things of value. (A statement that income for the required periods was in excess of a certain specified amount will be sufficient.)
 - g. If applicant or any person named in the exhibit has pledged, hypothecated or otherwise encumbered any stocks or other securities for the purpose of providing applicant with funds for construction of the station herein requested, submit a statement explaining each such transaction.
 - h. For financial institutions or equipment manufacturers who have agreed to make a loan or extend credit, submit a verified copy of the agreement by which the institution or manufacturer is so obligated, showing the amount of loan or credit, terms of payment, if any, and security, if any.

Broadcast Application		FEDERAL COMMUNICATIONS COMMISSION		Section IV
STATEMENT OF PROGRAM SERVICE OF BROADCAST APPLICANT		Name of applicant Natick Broadcast Associates, Inc.		
NOTICE TO ALL APPLICANTS				
<p>The replies to the following questions constitute a representation of programming policy upon which the Commission will rely in considering the application. It is not expected that licensee will or can adhere inflexibly in day-to-day operation to the representation here made. However, since such representation will constitute, in part, the basis upon which the Commission acts on the application, time and care should be devoted to the preparation of the replies so that they will reflect accurately applicant's responsible judgment of his proposed programming policy.</p>				
INSTRUCTIONS				
<p>1. Paragraphs 1 to 4 are divided into a left-hand column which pertains to past operation and a right-hand column which pertains to proposed operation. Applicants for new stations or assignees or transferees of existing stations are to fill in only the right-hand column while applicants for authorizations for renewal of existing station licenses are to fill in both columns.</p> <p>2. Program data on past performance are to be based on the composite week for the year preceding the date of application except in the case of renewal applications where the year preceding the expiration date of the existing license is to be used. The days comprising the composite week of each year will be designated by public notice on or about November 15th of that year.</p> <p>3. Program classifications incident to the replies to Paragraphs 2, 3, and 4 below, are to be in accordance with the definitions on Page 4 of this Section.</p> <p>4. Assignees or transferees filing FCC Form 314 or 315 need not complete paragraphs 5 or 8.</p>				
PAST OPERATION		PROPOSED OPERATION (for a typical week)		
<p>1. (a) State actual minimum weekly schedule of operation under the present authorization, giving opening and closing time and total hours for weekdays and Sunday.</p> <p style="text-align: center; font-size: 1.2em;">Not Applicable</p>		<p>(b) State minimum weekly schedule of operation proposed by licensee, permittee, assignee or transferee, giving opening and closing time and total hours for weekdays and Sunday.</p> <p style="text-align: center; font-size: 1.2em;">Total Hours: 83:14</p> <p style="text-align: center; font-size: 1.2em;">Monday - Sat. 5:58 AM - 6:00 PM</p> <p style="text-align: center; font-size: 1.2em;">Sunday 6:58 AM - 6:00 PM</p>		
<p>2. (a) State for the composite week the percentage of time which was devoted to each of the following types of programs (totals to equal 100%).</p> <p style="text-align: center; font-size: 1.2em;">Not Applicable</p>		<p>(b) State the percentage of time to be devoted to each of the following types of programs for a proposed typical week of operation under the authorization requested (totals to equal 100%). Attach program schedule for this proposed typical week and indicate thereon the class of each program in accordance with paragraph 4(b).</p> <p style="text-align: center; font-size: 1.2em;">See Exhibit 5 - Appendix A</p>		
<p>(1) Entertainment (include here all programs which are intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's, etc.)</p>	_____ %	<p>(1) Entertainment (include here all programs which are intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's, etc.)</p>	64.26 %	
<p>(2) Religious (include here all sermons, religious news, music, and drama, etc.)</p>	_____ %	<p>(2) Religious (include here all sermons, religious news, music, and drama, etc.)</p>	4.99	
<p>(3) Agricultural (include here all programs containing farm or market reports or other information specifically addressed to the agricultural population)</p>	_____ %	<p>(3) Agricultural (include here all programs containing farm or market reports or other information specifically addressed to the agricultural population)</p>	1.20	
<p>(4) Educational (include here programs prepared by or in behalf of educational organizations, exclusive of discussion programs which should be classified under (6) below)</p>	_____ %	<p>(4) Educational (include here programs prepared by or in behalf of educational organizations, exclusive of discussion programs which should be classified under (6) below)</p>	2.24 %	
<p>(5) News (include here news reports and commentaries)</p>	_____ %	<p>(5) News (include here news reports and commentaries)</p>	17.14 %	
<p>(6) Discussion (include here forum, panel and round-table programs)</p>	_____ %	<p>(6) Discussion (include here forum, panel and round-table programs)</p>	5.30 %	
<p>(7) Talks (include here all conversation programs which do not fall under Points (2), (3), (4), (5), or (6) above, including sports)</p>	_____ %	<p>(7) Talks (include here all conversation programs which do not fall under Points (2), (3), (4), (5), or (6) above, including sports)</p>	4.87 %	
<p>(8) _____</p>	_____ %	<p>(8) _____</p>	0.00 %	
<p>(9) _____</p>	_____ %	<p>(9) _____</p>	0.00 %	
<p>(10) Miscellaneous</p>	_____ %	<p>(10) Miscellaneous</p>	0.00 %	
100		100		

Broadcast Application

STATEMENT OF PROGRAM SERVICE

Section IV, Page 2

3. (a) Dividing the broadcast week into 15 minute periods, specify below the number of 14½ minute periods within such 15 minute periods during the composite week in which were broadcast (exclusive of non-commercial spot announcements, call letter announcements and promotional announcements for sustaining programs):

Not Applicable

No. of 14½ minute periods

- (1) No spot announcements or commercial continuity _____
 (2) One spot announcement _____
 (3) Two spot announcements _____
 (4) Three spot announcements _____
 (5) Four spot announcements _____
 (6) Five or more spot announcements _____

Total number of 14½ minute periods _____

State the number of spot announcements (exclusive of non-commercial spot and call letter announcements, and promotional announcements for sustaining programs) broadcast during the

composite week which exceeded one minute in length _____
 (See definition of spot announcement)

(b) State what the practice of the station will be with respect to the number and length of spot announcements allowed in a given period.

Except in special cases, no spot longer than 60 seconds. No more than 14 1 minute announcements in any given hour. Station will subscribe to NAB standards.

4. In the tables below the percentages for each segment are to be computed on the basis of 100 percent of the operating hours within the particular segment for the seven days comprising the composite week (i.e., if full time operation, 70 hours for the 8 a.m. to 6 p.m. segment, 35 hours for the 6 p.m. to 11 p.m. segment, and the total weekly hours of operation between 11 p.m., and 8 a.m. for the third segment). The percentages in the column headed "Total" are to be computed on the basis of 100 percent of operating hours for the seven days.

The exact number of spot announcements should be stated, including those broadcast within participating programs, but excluding call letter announcements (call letters and location) and promotional announcements for sustaining programs.

NOTE: The purpose of the following tabulation is to enable the Commission to secure quantitative data as to the proportion of time (to be) devoted to the various classes of programs. The function of each class of program as part of a diversified program structure is discussed in the Commission's Report of March 7, 1946, entitled "Public Service Responsibility of Broadcast Licensees".

(a) State the percentage of time which was devoted to each of the following classes of programs during the composite week.

Not applicablePROGRAM LOG ANALYSIS
(in percentages)

8 a.m.- 6 p.m.- All
6 p.m. 11p.m. other
hours

	8 a.m.- 6 p.m.	6 p.m.- 11p.m.	All other hours	Total
(1) Network commercial (NC)				
(2) Network sustaining (NS)				
(3) Recorded commercial (RC)				
(4) Recorded sustaining (RS)				
(5) Wire commercial (WC)				
(6) Wire sustaining (WS)				
(7) Live commercial (LC)				
(8) Live sustaining (LS)				
(9) Total commercial (1+3+5+7)				
(10) Total sustaining (2+4+6+8)				
(11) Complete Total	100%	100%	100%	100%
(12) Actual broadcast hours (per week)				
(13) No. of spot announcements (SA) (per week)				
(14) No. of non-commercial spot announcements (NCSA) (per week)				

(b) Show in the table below the percentage of time proposed to be devoted to each of the following classes of programs during a proposed typical week of operation.

PROGRAM LOG ANALYSIS
(in percentages)

8 a.m.- 6 p.m.- All
6 p.m. 11p.m. other
hours

(1) Network commercial (NC)	- None -			
(2) Network sustaining (NS)	- None -			
(3) Recorded commercial (RC)	54.37	6.83	61.20	
(4) Recorded sustaining (RS)	1.34	3.16	4.50	
(5) Wire commercial (WC)	- None -			
(6) Wire sustaining (WS)	- None -			
(7) Live commercial (LC)	18.24	3.51	21.75	
(8) Live sustaining (LS)	10.15	2.40	12.55	
(9) Total commercial (1+3+5+7)	72.61	10.34	82.95	
(10) Total sustaining (2+4+6+8)	11.49	5.56	17.05	
(11) Complete Total	100%	100%	100%	100%
(12) Proposed broadcast hours (per week)	70:00	13:14	83:14	
(13) No. of spot announcements (SA) (per week)	680	0	90	770
(14) No. of non-commercial spot announcements (NCSA) (per week)	136	0	24	160

Broadcast Application	STATEMENT OF PROGRAM SERVICE	Section IV, Page 3
5. (a) Attach as Exhibit No. _____ the original or one exact copy of the program log for the seven days comprising the composite week analyzed in the preceding paragraphs. (If original logs are submitted they will be returned.)	8. If this application is for an FM authorization, will the programs of any AM station operating in the same area be duplicated? If the answer is yes, Yes <input type="checkbox"/> No <input type="checkbox"/>	
(b) What year's composite week has been analyzed in the foregoing paragraphs? Not Applicable	(a) How many hours per day will be devoted to duplicated programs?	
6. Will the proposed station be affiliated with any network? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If the answer is "Yes", give the name of the network.	(b) Call letters and location of the AM station Not Applicable	
7. Attach as Exhibit No. 6 a narrative statement on the policy to be pursued with respect to making time available for the discussion of public issues, including illustrations of the types of programs to be broadcast and the methods of selection of subjects and participants.	(c) What kinds of programs (musical, sports, etc.) will be duplicated?	
	9. State the average number of hours per week which will be used in advertising or promoting any business, profession or activity other than broadcasting in which the applicant is engaged or financially interested either directly or indirectly. If this is an application for renewal of license, show this data for the past license period also. None Contemplated	
	10. If the data furnished in response to the questions in this Section IV do not in the applicant's opinion adequately reflect station operation, attach as Exhibit No. 5 a statement setting forth any additional program data that the applicant desires to call to the Commission's attention. (If the applicant feels that the program material classified in Paragraph 2 is susceptible of classifications other than those listed he may supplement Paragraph 2 with an explanatory statement in this Exhibit.)	
11. If this application is for a television authorization, will programs be broadcast in color? Yes <input type="checkbox"/> No <input type="checkbox"/> If "Yes", will programs be: Network <input type="checkbox"/> Local Live <input type="checkbox"/> Local Slide <input type="checkbox"/>		
12. State applicant's general plans for staffing the station, including the number of employees in each department (i.e. program, commercial, technical, etc.), and the names, residence and citizenship of the general manager, station manager, program director and other department heads who have been employed or whom the applicant expects to employ.		
See Exhibit 5		

[145]

138

[145]

[Rec'd Aug. 2, 1965-FCC]

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE SECRETARY
STATE HOUSE, BOSTON 33
MARCH 24, 1965

Kevin H. White
Secretary of the Commonwealth

A true copy Witnessed under the Great Seal of the
Commonwealth of Massachusetts.

/s/ Kevin H. White
Secretary of the Commonwealth

/s/ Lawrence F. Fallon
Deputy Secretary.

[SEAL]

[146]

[Rec'd-Aug. 2, 1965-FCC]

THE COMMONWEALTH OF MASSACHUSETTS
KEVIN H. WHITE
Secretary of the Commonwealth
STATE HOUSE
BOSTON, MASS.

ARTICLES OF ORGANIZATION

We, Roland J. Boucher, Jr., Stanley H. Feldberg, Sumner Feldberg, Newell B. Kurson, William F. Miller, Edward F. Perry, Jr., and Richard A. Smith, being a majority of the directors of

NATICK BROADCAST ASSOCIATES, INC.

elected at its first meeting in compliance with the requirements of General Laws, Chapter 156, Section 10, hereby certify that the following is a true copy of the agreement of association to form said corporation, and under the names of the subscribers thereto:

We, whose names are hereto subscribed, do, by this agreement, associate ourselves with the intention of forming a corporation under the provisions of General Laws, Chapter 156.

The name by which the corporation shall be known is

NATICK BROADCAST ASSOCIATES, INC.

The location of the principal office of the corporation in Massachusetts is to be in the city or town of Natick,

[The business address of the corporation is to be

Street and number (if office building, give room number) Name of town.

If such business address is not yet determined, give the name and business address of the treasurer or other officer to receive mail.

c/o Edward F. Perry, Jr., President, 203 Pond Street, Natick, Mass.]
Name and title of officer to receive mail and his complete business address.

The purposes for which the corporation is formed and the nature of the business to be transacted by it are as follows:

To engage in a general radio and/or television broadcasting business and, in connection therewith, to create, acquire, own, operate and otherwise deal in commercial and/or experimental amplitude and/or frequency modulation, radio, television and/or facsimile, broadcasting station(s), and/or any similar media of electronic communication, including the operation and participation in a radio and/or television network, chain and/or system, and or participation in the operation of a community antenna television system(s), and to engage also in the business of supplying radio and/or television programming, information and services by wire and/or otherwise, on a fee and/or subscription basis, and only when authorized under such necessary permits and licenses as issued by the Federal Communications Commission of the United States of America and otherwise in accordance with federal, state and municipal regulations, licenses, permits and laws; and to generally engage in the business of recording sound by voice, music or otherwise, on discs, tapes and otherwise and filming of pictures and to reproduce the same without limitation; and to sell, rent, lease, hire and acquire sound systems and equipment, public address

[147]

systems, music systems; and to contract for, hire and supply technicians, talent, music, orchestras, musicians, announcers in connection with recording and broadcasting; and generally to engage in the business of advertising by radio and television broadcasting and otherwise; and to engage in all the foregoing together with all the related items thereto without limitation.

Generally, to purchase, lease, rent, sell and buy, exchange or otherwise acquire any real and personal property and any rights or privileges which the corporation may deem necessary or convenient for the purpose of its business, for cash or otherwise; to mortgage, pledge, execute promissory

notes, all in the interests of the corporation; to acquire the good will, rights, property and assets of all kinds and to undertake the whole or any part of the liabilities of any person, firm, association or corporation and to pay for the same in cash, stocks, bonds, debentures or other securities of this corporation or otherwise; and to do all other things in the interests of the corporation which are permitted by law, under General Laws, Chapter 156 and Chapter 156B as enacted by Chapter 723 of the Acts of 1964.

[148]

The total capital stock to be authorized is as follows:

CLASS OF STOCK	WITHOUT PAR VALUE	WITH PAR VALUE		
	NUMBER OF SHARES	NUMBER OF SHARES	PAR VALUE	AMOUNT
Preferred	None	None		\$ None
Common	2000	None		None

Restrictions, if any, imposed upon the transfer of shares:

(Printed or photostatic restrictions must not be attached in this space)

None

A description of the different classes of stock, if there are to be two or more classes, and a statement of the terms on which they are to be created and of the method of voting thereon:

None

Other lawful provisions, if any, for the conduct and regulation of the business of the corporation, for its voluntary dissolution, or for limiting, defining, or regulating the powers of the corporation, or of its directors or stockholders, or of any class of stockholders:

None

[149]

[Record page 149 is identical to record page 147 and is printed supra at pages 140-141.]

[150]

[If seven day's notice is given, complete the following paragraph.]

The first meeting shall be called by _____
of _____

[If notice is waived, fill in the following paragraph.]

We hereby waive all requirements of the General Laws of Massachusetts for notice of the first meeting of the incorporators for the purpose of organization, and appoint the 18th day of March, 1965, at 9 o'clock A.M., at 1 Mercer Rd., Natick as the time and place for holding such first meeting.

The names and residences of the incorporators and the amount of stock subscribed for by each are as follows:

NAME First Name Must Be Written In Full. Initials and abbrevia- tions are not sufficient.	Actual Place of Residence Must Be Given	AMOUNT OF STOCK SUBSCRIBED FOR	
		Preferred	Common
Roland J. Boucher, Jr.	3 Draper St., Natick, Mass.	None	None
Stanley H. Feldberg	9 Monadnock Rd., Wellesley, Mass.	None	None
Sumner Feldberg	34 Monadnock Rd., Newton, Mass.	None	None
Leon M. Fox	7 Flynn St., Natick, Mass.	None	None
Newell B. Khurson	14 Greylock Rd., Newton, Mass.	None	None
William F. Miller	Dedham St., Dover, Mass.	None	None
Edward F. Perry, Jr.	203 Pond St., Natick, Mass.	None	None
Richard A. Smith	55 Chestnut Hill Rd., Newton, Mass.	None	None

IN WITNESS WHEREOF we hereto sign our names, this 18th day of March, 1965.

(Type or plainly print the name of each incorporator as signed to the Agreement of Association.)

ROLAND J. BOUCHER, JR.

NEWELL B. KURSON

STANLEY H. FELDBERG

WILLIAM F. MILLER

SUMNER FELDBERG

EDWARD F. PERRY, JR.

LEON M. FOX

RICHARD A. SMITH

[151]

And we further certify that:

The first meeting of the subscribers to said agreement was held on the 18th day of March, 1965.

The amount of capital stock now to be issued $\frac{1}{2}$ is as follows:

CLASS OF STOCK	NUMBER OF SHARES	
	WITHOUT PAR VALUE	WITH PAR VALUE
Preferred	None	None
Common	1541	None

TO BE PAID FOR:	Preferred	Common
IN CASH:		
In full		1541 shares
By instalments		
Amount of instalment to be paid before commencing business		
IN PROPERTY:		
REAL ESTATE		
Location		
Area		
PERSONAL PROPERTY:		
Accounts receivable		
Notes receivable		
Merchandise		
Supplies		
Securities		
Machinery		
Motor vehicles and trailers		
Equipment and tools		
Furniture and fixtures		
Patent rights		
Trade-marks		
Copyrights		
Goodwill		
<u>1/</u> IN SERVICES		
<u>2/</u> IN EXPENSES		

1/ No stock shall be at any time issued unless the cash, so far as due, or the property, services or expenses for which it was authorized to be issued, has been actually received or incurred by, or conveyed or rendered to, the corporation, or is in its possession as surplus; nor shall any note or evidence of indebtedness, secured or unsecured, of any person to whom stock is issued, be deemed to be payment therefor; and the president, treasurer and directors shall be jointly and severally liable to any stockholder of the corporation for actual damages caused to him by such issue.

2/ SERVICES and EXPENSES: Services must have been rendered and expenses incurred before stock is issued therefor. State clearly the nature of such services or expenses and the amount of stock to be issued therefor.

The name, residence, and post office address of each of the officers of the corporation is as follows:

NAME	DOMICIL Actual Place of Residence Must Be Given	POST OFFICE ADDRESS Home or Business
President		
Edward F. Perry, Jr.	203 Pond St., Natick	203 Pond St., Natick
Treasurer		
Newell B. Kurson	14 Greylock Rd., Newton	351 Newbury St., Boston
Clerk		
Leon M. Fox	7 Flynn St., Natick	65 Concord St., Framingham
Directors		
Roland J. Boucher, Jr.	3 Draper St., Natick	3 Draper St., Natick
Stanley H. Feldberg	9 Monadnock Rd., Wellesley	1 Mercer Rd., Natick
Sumner Feldberg	34 Monadnock Rd., Newton	1 Mercer Rd., Natick
Newell B. Kurson	14 Greylock Rd., Newton	351 Newbury St., Boston
William F. Miller	Dedham Street, Dover	Dedham St., Dover
Edward F. Perry, Jr.	203 Pond St., Natick	203 Pond St., Natick
Richard A. Smith	55 Chestnut Hill Rd., Newton	480 Boylston St., Boston

e. We, being a majority of the directors of NATICK BROADCAST ASSOCIATES, INC. do hereby certify that the provisions of sections eight and nine of Chapter 156 relative to the calling and holding of the first meeting of the corporation, and the election of a temporary clerk, the adoption of by-laws and the election of officers have been complied with.

f. The final day of the corporation's fiscal year is August thirty-one and the date provided in the by-laws for the annual meeting is third Tuesday, October.

IN WITNESS WHEREOF AND UNDER THE PENALTIES OF PERJURY, we hereto sign our names, this 18th day of March, 1965.

/s/ Roland J. Boucher, Jr.

/s/ Newell B. Kurson

/s/ Stanley H. Feldberg

/s/ William F. Miller

/s/ Sumner Feldberg

/s/ Edward F. Perry, Jr.

/s/ Richard A. Smith

[153]

146

[153]

THE COMMONWEALTH OF MASSACHUSETTS
ARTICLES OF ORGANIZATION
GENERAL LAWS, CHAPTER 156, SECTION 10

RECEIVED

\$75.00

March 23, 1965

Corporation Division
SECRETARY'S OFFICE

MARCH 23, 1965

I hereby certify that, upon an examination of the within-written articles of organization, duly submitted to me, it appears that the provisions of the General Laws relative to the organization of corporations have been complied with, and I hereby approve said articles and cause them to be recorded and filed when validated.

/s/ Kevin H. White
Secretary of the Commonwealth

RECEIVED

March 23, 1965

Corporation Division
SECRETARY'S OFFICE

TO BE FILLED IN BY CORPORATION:

CHARTER TO BE SENT TO

LEON M. FOX, ESQ.

65 Concord Street

Framingham, Mass. 01701

FILING FEE: 1/20 of 1% of the total amount of the authorized capital stock with par value, and one cent a share for all authorized shares without par value, but not less than \$75. General Laws, Chapter 156, Section 53.

[154]

[Rec'd-Aug. 2, 1965-FCC]

Exhibit 1 (Part B)
II - 3
(March 1965)

**CERTIFICATE OF CLERK OF
NATICK BROADCAST ASSOCIATES, INC.**

I, Leon M. Fox, certify that I am the duly elected and acting Clerk of Natick Broadcast Associates, Inc., a Massachusetts Corporation duly organized by law and having its principal place of business in Natick, Middlesex County, Massachusetts. I further certify that the following is a true and complete copy of the Agreement of Association and of the By-laws of said Natick Broadcast Associates, Inc. including all amendments, if any, and the same are in full force and effect as of this date.

Witness my hand and seal this nineteenth day of March, 1965.

/s/ Leon M. Fox
Clerk

[Rec'd-Aug. 2, 1965-FCC]

NATICK BROADCAST ASSOCIATES, INC.INCORPORATED March 23, 1965LOCATION Natick, Massachusetts

President	Edward F. Perry, Jr.
Vice-president	Roland J. Boucher, Jr.
Vice-president	William F. Miller
Treasurer	Newell B. Kurson
Asst. Treasurer	Stanley H. Feldberg
Asst. Treasurer	Sumner Feldberg
Asst. Treasurer	Richard A. Smith
Clerk	Leon M. Fox

BOARD OF DIRECTORS

Roland J. Boucher, Jr.
Stanley H. Feldberg
Sumner Feldberg
Newell B. Kurson
William F. Miller
Edward F. Perry, Jr.
Richard A. Smith

ATTORNEY

LEON M. FOX, ESQ.
65 Concord Street
Framingham, Mass. 01701

[156]

[Rec'd-Aug. 2, 1965-FCC]

AGREEMENT OF ASSOCIATION

We, whose names are hereto subscribed, do, by this agreement, associate ourselves with the intention of forming a corporation under the provisions of General Laws, Chapter 156.

The name by which the corporation shall be known is:

NATICK BROADCAST ASSOCIATES, INC.

The location of the principal office of the corporation in Massachusetts is to be in the city or town of Natick.

The purposes for which the corporation is formed and the nature of the business to be transacted by it are as follows:

To engage in a general radio and/or television broadcasting business and, in connection therewith, to create, acquire, own, operate and otherwise deal in commercial and/or experimental amplitude and/or frequency modulation, radio, television and/or facsimile, broadcasting station(s), and/or any similar media of electronic communication, including the operation and participation in a radio and/or television network, chain and/or system, and/or participation in the operation of a community antenna television system(s), and to engage also in the business of supplying radio and/or television programming, information and services by wire and/or otherwise, on a fee and/or subscription basis, and only when authorized under such necessary permits and licenses as issued by the Federal Communications Commission of the United States of America and otherwise

[157]

in accordance with federal, state and municipal regulations, licenses, permits and laws; and to generally engage in the business of recording sound by voice, music or otherwise, on discs, tapes and otherwise and filming of pictures and to reproduce the same without limitation; and to sell, rent, lease, hire and acquire sound systems and equipment, public address systems, music systems; and to contract for, hire and supply technicians, talent, music, orchestras, musicians, announcers in connection with recording and broadcasting; and generally to engage in the business of advertising by radio and television broadcasting and otherwise; and to engage in all the foregoing together with all the related items thereto without limitation.

Generally, to purchase, lease, rent, sell and buy, exchange or otherwise acquire any real and personal property and any rights or privileges which the corporation may deem necessary or convenient for the purpose of its business, for cash or otherwise; to mortgage, pledge, execute promissory notes, all in the interests of the corporation; to acquire the good will, rights, property and assets of all kinds and to undertake the whole or any part of the liabilities of any person, firm, association or corporation and to pay for the same in cash, stocks, bonds, debentures or other securities of this corporation or otherwise; and to do all other things in the interests of the corporation which are permitted by law, under General Laws, Chapter 156 and Chapter 156B as enacted by Chapter 723 of the Acts of 1964.

[158]

The total capital stock to be authorized is as follows:

Preferred Stock	-	None
Common Stock	-	2,000 shares without par value

Restrictions, if any, imposed upon the transfer of shares — None.

A description of the different classes of stock, if there are to be two or more classes, and a statement of the terms on which they are to be created and of the method of voting thereon: None.

Other lawful provisions, if any, for the conduct and regulation of the business of the corporation, for its voluntary dissolution, or for limiting, defining, or regulating the powers of the corporation, or of its directors or stockholders, or of any class of stockholders: None.

We hereby waive all requirements of the General Laws of Massachusetts for notice of the first meeting of the incorporators for the purpose of organization, and appoint the eighteenth day of March, 1965 at 9 o'clock A.M., at 1 Mercer Rd., Natick, as the time and place for holding such first meeting.

The names and residences of the incorporators and the amount of stock subscribed for by each are as follows:

NAME	DOMICIL	AMOUNT OF STOCK SUBSCRIBED FOR	
		Preferred	Common
Roland J. Boucher, Jr.	3 Draper St., Natick, Mass.	None	None
Stanley H. Feldberg	9 Monadnock Rd., Wellesley, Mass.	None	None

[159]

NAME	DOMICIL	AMOUNT OF STOCK SUBSCRIBED FOR	
		Preferred	Common
Sumner Feldberg	34 Monadnock Rd., Newton, Mass.	None	None
Leon M. Fox	7 Flynn St., Natick, Mass.	None	None
Newell B. Kurson	14 Greylock Rd., Newton, Mass.	None	None
William F. Miller	Dedham St., Dover, Mass.	None	None
Edward F. Perry, Jr.	203 Pond St., Natick, Mass.	None	None
Richard A. Smith	55 Chestnut Hill Rd., Newton, Mass.	None	None

IN WITNESS WHEREOF we hereto sign our names, this 18th day of
March, 1965.

/s/ Roland J. Boucher, Jr.

/s/ Stanley H. Feldberg

/s/ Sumner Feldberg

/s/ Leon M. Fox

/s/ Newell B. Kurson

/s/ William F. Miller

/s/ Edward F. Perry, Jr.

/s/ Richard A. Smith

MEETING OF ORGANIZATION

The first meeting of the signers of an Agreement of Association dated March 18, 1965, for the purpose of forming a corporation to be known as

NATICK BROADCAST ASSOCIATES, INC.

was duly held this day at 9 A.M. at 1 Mercer Road, Natick, Massachusetts, all of the subscribers to said Agreement being present.

The following temporary organization was effected by ballot:

Chairman ----- Edward F. Perry, Jr.

Temporary Clerk --+- Leon M. Fox

The Temporary Clerk was then sworn according to the following oath:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

Natick, Mass., Mar. 18, 1965

Then personally appeared Leon M. Fox and made oath that he would faithfully and impartially discharge the duties of Temporary Clerk of NATICK BROADCAST ASSOCIATES, INC.,

Before me,

/s/ Sidney W. Lebewohl
Notary Public

The Temporary Clerk then read the Agreement of Association and Waiver of Notice, and

On motion duly made and seconded, it was unanimously

VOTED: To adopt the following By-Laws.

BY -- LAWS

ARTICLE INAME, OBJECT AND POWERS

Section 1. The name by which this corporation shall be known is
NATICK BROADCAST ASSOCIATES, INC.

Section 2. The objects and purposes for which the corporation is formed are as stated in the Agreement of Association.

Section 3. The corporation shall have all the powers and privileges granted to similar corporations under the general law of the Commonwealth.

ARTICLE II

LOCATION

Section 1. The principal office of the corporation shall be located in the Town of Natick and the corporation may maintain such other offices as its business may from time to time require.

ARTICLE III

MEETINGS OF STOCKHOLDERS

Section 1. Place of Meetings Meetings of the stockholders shall be held at such place in the Commonwealth of Massachusetts as shall be specified in the notice of waiver of notice thereof.

Section 2. Annual Meetings The corporation shall, after the year 1965, hold annually a regular meeting of its stockholders for the election of Directors, a Treasurer and a Clerk, and for the transaction of general business on the

[162]

third Tuesday of October in each year if not a legal holiday, and if a legal holiday, then on the first day following which is not a legal holiday, at the hour specified in the notice thereof. In case the annual meeting for any year shall not be duly called or held, the Board of Directors or the President shall cause a special meeting to be held as soon as may be thereafter, in lieu of and for the purposes of such annual meeting, and all proceedings at such special meeting shall have the same force and effect as if taken at the regular meeting.

Section 3. Special Meetings At any time in the interval between annual meetings, special meetings of the stockholders shall be called by the Clerk, or by such person as The Board of Directors shall appoint, whenever requested so to do by the President or by a majority of the

Board of Directors, or upon the written application of one or more stockholders who are entitled to vote and who hold at least a one-tenth part in interest of the capital stock entitled to vote at a meeting. Such written request or application shall state the time, place and purpose of any such meeting.

Section 4. Notice of Meetings Written or printed Notice of each annual or special meetings of the stockholders stating the place, day and hour thereof, shall be given by the Clerk or by any other officer designated by the Board of Directors at least seven days before the meeting to each stockholder entitled to vote thereat, by leaving such notice with him or at his residence or usual place of business, or by mailing it,

[163]

postage prepaid, and addressed to such stockholder at his address as it appears on the books of the corporation. It shall not be requisite to the validity of any meeting of stockholders that notice thereof shall have been given to any stockholder who attends in person or by proxy, or waives notice thereof in writing filed with the records of the meeting, either before or after the holding thereof. No notice of the time, place or purpose of any regular or special meeting of the stockholders shall be required if all the stockholders are present thereat, or if every stockholder, or his attorney, thereunto duly authorized, by a writing which is filed with the records of the meeting, waives such notice. No notice of any adjourned meeting shall be required.

Section 5. Quorum Unless otherwise provided by law and except as otherwise provided in the Agreement of Association, at all meetings of stockholders the presence in person or by proxy of stockholders who together hold at least a majority of the total number of votes entitled to be cast at said meeting, shall be necessary to constitute a quorum for the transaction of business. In the absence of a quorum the stockholders present in person or by proxy may adjourn for a period not exceeding thirty (30) days without notice other than by announcement

at the meeting. At such adjourned meeting any business may be transacted which might have been transacted at the meeting as originally called, provided a quorum be in attendance.

Section 6. Voting At every meeting of the stockholders every stockholder of the corporation having the right to vote shall

[164]

be entitled to one vote for every share of voting stock standing in his name on the books of the corporation, except that no share of stock shall be voted on if any instalment of the subscription thereof has been duly demanded as required by law, and is overdue and unpaid. The election of directors, a treasurer and a clerk shall be by ballot. Unless otherwise provided by statute, and except as otherwise provided in the Agreement of Association, a majority of the votes cast shall be sufficient to elect any officer and pass any measure. In case of the decease of any stockholder, votes may be given by his personal representative.

Section 7. Proxies Any stockholder entitled to vote at any meeting of the stockholders may vote either in person or by proxy. No proxy which is dated more than six months before the meeting named therein shall be accepted, and no such proxy shall be valid after the final adjournment of such meeting. Every proxy shall be in writing, subscribed by the stockholder or his duly authorized attorney, and dated, but need not be sealed, witnessed or acknowledged.

Section 8. Powers and Duties of Incorporators Whenever in these by-laws reference is made to action by or the powers or duties of stockholders, such action, powers and duties may, prior to the issue of stock, be taken or exercised by the incorporators.

ARTICLE IV

BOARD OF DIRECTORS

Section 1. Elections and Powers The property, affairs and business of the corporation shall be managed and conducted by

[165]

its Board of Directors which shall consist of not less than three nor more than nine Directors, as may be established by the stockholders at their annual meeting. The Directors need not be stockholders, and subject to the provisions of these by-laws and without limitation of the generality of the foregoing, shall have the power, (1) to appoint and remove, at their pleasure, all officers (except Directors, Treasurer and Clerk) and all representatives, agents and employees of this corporation, prescribe their duties, fix their compensation, and, if they deem proper, require from them security for the faithful performance of their duties, (2) to conduct, manage and control the affairs and business of the corporation; and to make such rules and regulations not inconsistent with these by-laws or the laws of the United States of America or the Commonwealth of Massachusetts, or any other state, territory, dependency or foreign country, in which the corporation may be doing business, as they deem necessary or proper for the guidance of the officers, employees and management of the affairs of the corporation, (3) to elect a President and any number of Vice-Presidents, (4) to appoint a general manager of this corporation whenever they deem it necessary so to do, (5) to elect Assistant Treasurers and other subordinate officers as they may deem advisable from time to time, (6) upon such terms as they may determine, to sell, issue and dispose of any and all shares of the capital stock of this corporation of which this corporation shall have the power to dispose, whether or not the same shall have been previously issued, including the right to purchase or otherwise acquire shares of its own capital stock.

[166]

Section 2. Meetings of Directors The Board of Directors may prescribe such rules in regard to the meetings of the Board as they may deem necessary. A legal meeting may be held at any time by order of the President and shall be called by the Clerk upon request of any member of the Board in the same manner as prescribed for the special meetings of the stockholders in the by-laws, except that forty-eight (48) hours' notice shall be sufficient. A legal meeting of the Board of Directors may be held at any time without notice when all Directors are present.

Section 3. Quorum A majority of the Board of Directors shall constitute a quorum at any regular or special meeting of the Board.

Section 4. Special Action of Directors When all the Directors (provided they include at least a majority of the number of Directors required at the time to constitute a full Board as fixed in or determined pursuant to these by-laws as then in effect) shall be present at any meeting, however called, or whenever held, or shall in writing (including a telegram) have waived notice of a meeting, or after a meeting shall have approved in writing the record thereof, the acts of such meeting, whether or not it was duly called and whether or not the absent directors, if any, were given notice thereof, and wherever it was held, shall be valid in all respects as if such meeting had been regularly called and held.

Section 5. Vacancies Whenever a vacancy occurs in the Board of Directors through death, resignation, or any other

[167]

cause, such vacancy shall be filled by appointment by the Board of Directors, and such successor shall hold office for the unexpired term of the Director whose place shall be vacant, and until his successor shall have been duly elected and qualified. Such appointment shall be made by resolution.

Section 6. Without in any manner limiting the foregoing broad powers of the Directors, the Directors are authorized to make contributions, in such amounts as they may determine to be reasonable, to corporations, trusts, funds or foundations, organized and operated exclusively for charitable, scientific or educational purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

ARTICLE V

Section 1. Officers The officers of the corporation shall be a President, a Treasurer and a Clerk, and such subordinate or assistant officers as the Board of Directors shall from time to time elect. Two or more offices may be held by the same person. The treasurer and the Clerk shall be elected by ballot at the annual meeting of the stockholders in each year. The President shall be elected by the Board of Directors from among their number. The Board of Directors may also elect, if they so desire, Vice Presidents and Assistant Treasurers from within or without their number. All of said officers shall hold their respective offices for the term of one year and thereafter until their successors are elected and qualify, subject, however, to resignation or removal. Any vacancy in any of the above offices shall be filled for the unexpired portion of the term by the Board of Directors at any regular or special meeting.

[168]

Section 2. President The President shall, when present, preside at all meetings of the stockholders and of the Board of Directors; he shall sign the certificates of stock of the corporation with the Treasurer; he shall annually prepare a full and true statement of the affairs of the corporation which shall be submitted at the annual meeting of the stockholders; in general, the President shall perform such other duties as, from time to time, may be assigned to him by the Board of Directors.

Section 3. Vice President The Vice President, if but one shall be elected, or the Vice President designated as Executive Vice President, if one shall be so designated, shall preside at all meetings of the stockholders and Directors in the absence of the President, and each Vice President shall perform such duties as may from time to time be assigned to him by the Board of Directors.

Section 4. Treasurer The Treasurer shall give a bond for the faithful performance of his duties if and when required by the Directors. He shall have charge of the corporate seal of the corporation, shall deposit all funds of the corporation in such depositories as may be selected by the Board of Directors, pay all its bills, collect all moneys due to the corporation, and with the President sign all certificates of stock. He shall keep or cause to be kept full and accurate books of account containing a record of all purchases and sales, of all money received and paid out for the corporation, which books and accounts shall be constantly open to the inspection of each officer and director of the corporation, and shall

[169]

render to the Board of Directors at least once each year a trial balance showing the assets and liabilities of the corporation; and in general, shall perform all the duties incident to the office of a Treasurer of a corporation, and such other duties as may be assigned to him by the Board of Directors.

Section 5. Clerk The Clerk shall be a resident of the Commonwealth of Massachusetts, shall attend all meetings of the stockholders and directors and shall keep full, true and accurate records of all business transacted at such meetings, and shall discharge all other duties properly appertaining to his office and which shall be attached thereto by the Board of Directors. He shall have the custody of the record books of the corporation. He shall give notice of all meetings of the stockholders and directors in the manner prescribed in these by-laws. The Clerk shall be duly sworn to the faithful and impartial discharge of his duties, and in the absence, incapacity or inability of the Clerk to act, a Temporary Clerk shall be chosen by ballot who shall also be duly sworn.

Section 6. Assistant Officers The Board of Directors may elect one or more Assistant Treasurers. Each Assistant Treasurer if any, shall hold office for such period as the Board of Directors may prescribe, shall perform all duties of the Treasurer in his absence, or when so required to do by the Board of Directors, and shall have such authority and perform such duties as the Board of Directors may prescribe.

Section 7. Compensation The Board of Directors shall have power to fix the compensation of all officers and directors of the corporation.

Section 8. Removal. At any meeting of the stockholders called for the purpose, any director, clerk or treasurer may, by a majority vote of the stockholders entitled to vote, be removed from office with or without cause, and another be elected by vote of a majority of the stockholders entitled to vote, in the place of the person so removed, to serve for the remainder of his term.

At any meeting of the directors called for the purpose, any officer elected by the directors may, by a majority vote of the directors entitled to vote, be removed from office with or without cause, and another be elected by vote of a majority of the directors entitled to vote, in the place of the person so removed, to serve for the remainder of his term.

Section 9. Each director and officer, whether or not then in office, shall be indemnified by the corporation against all costs and expenses reasonably incurred by or imposed upon him in connection with or resulting from any action, suit or proceeding to which he may be made a party by reason of his being or having been a Director or officer of the corporation, except in relation to matters as to which a recovery shall be had against him by reason of his having been finally adjudged in such action, suit or proceeding to have been derelict in the performance of his duties as such director or officer. Each person (including a director or officer of the corporation) who, at the request of the corporation, acts

as a director or officer of any other company in which the corporation has a controlling interest, may be indemnified by the corporation, by resolution adopted by its Board of Directors and

[171]

subject to limitations similar to those contained in the preceding paragraph of this Article, against any costs and expenses which may be imposed upon or reasonably incurred by him in connection with any action, suit or proceeding in which he may be named as a party defendant by reason of his being or having been a director or officer of such other company or by reason of any action alleged to have been taken or omitted by him in either such capacity.

The foregoing rights to indemnity shall include reimbursements of the amounts and expenses paid in settling any such actions, suits or proceedings, when settling appears to be in the interest of the corporation as determined by its Board of Directors, and shall not be exclusive of other rights to which such director or officer may be entitled as a matter of law.

ARTICLE VI

STOCK Section 1. Certificates Certificates of stock shall be of such form and device as the Directors may determine, and each certificate shall be signed by the President and Treasurer and shall express on its face its number, date of issue, whether preferred or common stock, and the number of shares for which, and the name of the person to whom, it is issued.

Section 2. Transfer of Shares Subject to the provisions in the Agreement of Association, shares in this corporation shall be transferable in person or by attorney by an instrument in writing, recorded in the books of the corporation, and on surrender of the certificates by which the shares are transferred, and thereupon a new certificate or certificates shall be issued according to the interests of the party.

[172]

Section 3. Closing of Transfer Books The Board of Directors may close the transfer books in their discretion for a period not exceeding twenty (20) days preceding any meeting, annual or special, of the stockholders on the day appointed for the payment of a dividend.

Section 4. Registered Stockholders The corporation shall be entitled to treat the holder of record of any share or shares of stock as the holder in fact thereof and accordingly shall not be bound to recognize any equitable or other claim to or interest in such shares on the part of any other person whether or not it shall have express or other notice thereof save as expressly provided by the laws of Massachusetts.

Section 5. Mutilated, Lost or Destroyed Certificates The holder of any certificate representing shares of stock of the corporation shall immediately notify the corporation of any mutilation, loss or destruction thereof, and the Board of Directors may, in its discretion, cause one or more new certificates for the same number of shares in the aggregate, to be issued to such holder upon surrender of the mutilated certificates, or in case of loss or destruction of the certificate, upon satisfactory proof of such loss or destruction, and the deposit of indemnity by way of bond or otherwise, in such form and amount and with such sureties as the Board of Directors may require to indemnify the corporation against loss or liability by reason of the issuance of such new certificates, but the Board of Directors may in its discretion refuse to issue such new certificates, save upon order of some court having jurisdiction in such matters.

[Received August 2, 1965 - FCC]

ARTICLE VII

DIVIDENDS AND FINANCE

Section 1. Dividends The Board of Directors may, in its discretion, declare what, if any dividends shall be paid from the surplus or from the net profits of the corporation upon the stock of the corporation, provided, however, that no dividend shall be declared or paid, the payment of which would diminish the amount of the paid-in capital. Dividends shall be payable upon such dates as the Board of Directors may designate. Before the payment of any dividend or making any distribution of profits, the Board of Directors from time to time in its absolute discretion, shall have power to set aside out of the surplus or net profits of the corporation, such sum or sums as they think proper as a reserve fund or for such other purpose as the Board of Directors shall think conducive to the best interests of the corporation.

Section 2. Checks, Drafts, Etc. The drawing of checks, acceptance of drafts and bills of exchange, and the signing of promissory notes and other negotiable instruments shall be by such person or persons and in such manner as may be authorized by the Board of Directors.

ARTICLE VIII

SUNDRY PROVISIONS

Section 1. Fiscal Year The fiscal year of the corporation shall be from September 1 each year through August 31 of the year following.

Section 2. Corporate Seal The corporate seal of the corporation shall bear the name of the corporation and the words "INCORPORATED 1965, MASSACHUSETTS".

Section 3. Bonds The Board of Directors may require the Treasurer and any other officer, agent or employee of the corporation, to give a bond to the corporation, conditioned upon the faithful discharge

of his duties, with one or more sureties, and in such amount as may be satisfactory to the Board of Directors.

Section 4. Transactions with Corporation No contract or other transaction between this corporation and one or more of its directors, officers or stockholders or between this corporation and any other corporation, firm or association in which one or more of its officers, directors or stockholders are officers, directors or stockholders shall be either void or voidable (1) if at a meeting of the Board of Directors or committee authorizing or ratifying the contract or transaction there is a quorum of persons not so interested and the contract or other transaction is approved by a majority of such quorum, or (2) if the contract or other transaction is ratified at an annual or special meeting of stockholders, or (3) if the contract or other transaction is just and reasonable to the corporation at the time it is made, authorized or ratified.

Section 5. Ratification Any transaction questioned in any stockholders' derivative suit on the ground of lack of authority, defective or irregular execution, or the appliance of improper principles or practices of accounting may be ratified before or after judgment by the Board of Directors or by the stockholders in case less than a quorum of directors are qualified; and, if so ratified, shall have the same force and effect as if the

[175]

questioned transaction had been originally duly authorized, and said ratification shall be binding upon the corporation and its stockholders and shall constitute a bar to any claim or execution of any judgment in respect of such questioned transaction.

Section 6. Reliance on Records Each officer, director or member of any committee designated by the Board of Directors in the manner hereinbefore provided shall in the performance of his duties be fully protected in relying in good faith upon the books of account or reports

made to the corporation by any of its officials, or by an independent certified public accountant, or by an appraiser selected with reasonable care by the Board of Directors or by any committee, or in relying in good faith upon other records of the corporation.

Section 7. Amendments These by-laws may be amended, altered or repealed, or new by-laws adopted by the vote of the holders of a majority of the voting shares of the capital stock of the corporation represented in person or by proxy at any annual or special meeting of the stockholders, provided notice of such proposed amendment, alteration, repeal or new by-law is contained in the call of said meeting. Wherever in these by-laws reference is made to the Agreement of Association, the same shall be deemed to include any and all Articles of Amendment thereto.

[176]

[Received August 2, 1965, FCC]

Exhibit 2
II-5, 19, 21
May 1965)

Natick Broadcast Associates, Inc.

Applicant

Applicant is a recently organized corporation formed pursuant to the laws of the Commonwealth of Massachusetts. (See Exhibit 1, Part A). It has eight shareholders, who are named and described below. Applicant's officers and directors are listed in Exhibit 1 (part B), p. 2)

Parties to ApplicationEdward F. Perry, Jr.

Edward F. Perry, Jr., was born in Boston, Massachusetts on December 19, 1940. He now resides at 203 Pond Street, Natick, Massachusetts.

Mr. Perry presently is employed by Ratheon Company in Norwood, Massachusetts. Previously he was employed by Computer Control Co., Inc., Framingham, Massachusetts (September 1962-August 1963 and March 1964-April 1965), as an engineering writer. His professional broadcasting experience involves employment with WMRC, Milford (August-September 1964) as consulting engineer and stand-by and vacation engineer for WKOX-AM-FM, Framingham (1963-1964) and announcer-engineer for WFLB, Fayetteville, North Carolina (December 1963-March 1964) and chief engineer and week-end announcer, WYNG, Warwick, Rhode Island (September 1962-March 1963). In addition, he was Music Director of WAMF-FM, Amherst, Massachusetts (September 1960-December 1961).

Mr. Perry holds 180 shares in Applicant. He is a 9% shareholder.

[177]

Roland J. Boucher, Jr.

Roland J. Boucher, Jr. was born in White Plains, New York on October 29, 1943. He now resides at 3 Draper Street, Natick, Massachusetts.

Since October 1964, Mr. Boucher has been employed as an engineer technician by WIHS-TV, Boston. He held the same position with WBZ, Boston (June 1964-October 1964 and May 1963-October 1963). He was production manager and recording supervisor with Continental Recordings, Inc., Framingham (October 1963-June 1964). He served as announcer-newsman for WMRC, Milford, Massachusetts (September 1962-May 1963) and was an assistant producer with WBZ-TV Boston (June 1961-September 1962).

Mr. Boucher's father is employed by certain area radio stations as a meteorologist.

Mr. Boucher holds 180 shares in Applicant. He is a 9% shareholder.

William F. Miller

William F. Miller was born in New York City on February 11, 1943. He now resides at Dedham and Mill Streets, Dover, Massachusetts.

Mr. Miller had been with WHDH, Boston, Massachusetts as a news editor and documentary writer since September 1964. Earlier he was with WBZ as a news editor (February 1963-September 1964). He was with WGBH and WBUR in 1961 and 1962 and was a part-time shoe salesman with A.S. Beck and Company in 1961-1962.

Mr. Miller holds 180 shares in Applicant. He is a 9% shareholder.

[178]

Leon M. Fox

Leon M. Fox was born in Boston on February 15, 1927. He now resides at 7 Flynn Street, Natick.

Mr. Fox is an attorney practicing in Natick. He holds various directorships or official positions incident to his professional duties.

Mr. Fox holds 120 shares in Applicant. He is a 6% shareholder.

Stanley H. Feldberg

Stanley H. Feldberg was born in Cambridge, Massachusetts on July 19, 1924. He now resides in Wellesley Hills, Massachusetts at 9 Monadnock Road.

Mr. Feldberg is president and a director of Zayre Corp. which operates self-service retail stores in the eastern part of the United States. Zayre Corp. is publicly held; the stock is traded on the American Stock Exchange.

Mr. Feldberg holds 268 shares in Applicant. He is a 13.4% shareholder.

Sumner L. Feldberg

Sumner L. Feldberg was born in Boston on June 19, 1924. He now resides at 34 Monadnock Road in Chestnut Hill, Massachusetts.

Mr. Feldberg is a cousin of Stanley H. Feldberg. Sumner L. Feldberg also is connected with Zayre Corp. as its Treasurer and as a director thereof.

Sumner L. Feldberg holds 268 shares in Applicant. He is a 13.4% shareholder.

[179]

Newell Bernard Kurzon

Newell Bernard Kurzon was born in Bangor, Maine on September 9, 1910. He now resides at 14 Greylock Road, Newtonville, Massachusetts.

Mr. Kurzon's principal occupation is as president, director and owner of Graphic Theatres Circuit which operates motion picture theatres in Maine, New Hampshire, Vermont and Massachusetts.

Mr. Kurzon holds 536 shares in Applicant. He is a 26.8% shareholder.

Richard Alan Smith

Richard Alan Smith was born in Boston, Massachusetts on November 1, 1924. He now resides at 55 Chestnut Hill Road, Newton, Massachusetts.

Mr. Smith's principal occupation is as president and chairman of the board of General Cinema Corporation which operates motion picture theatres and bowling centers. The corporation is publicly owned; its stock is traded on the American Stock Exchange.

Mr. Smith holds 268 shares in Applicant. He is a 13.4% shareholder.

[180]

[Received August 2, 1965, FCC]

[II-221d (Mar. 1965)]

THIS AGREEMENT made and entered into by and between NATICK BROADCAST ASSOCIATES, INC., a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, with a principal place of business in Natick in said Commonwealth (hereinafter referred

to as the "Company") and SUMNER FELDBERG, STANLEY FELDBERG, RICHARD A. SMITH, LEON M. FOX, NEWELL B. KURSON, ROLAND J. BOUCHER, JR., EDWARD F. PERRY, JR. AND WILLIAM F. MILLER (hereinafter referred to as the "Stockholders"),

W I T N E S S E T H :

The factual background within which this Agreement has been made is as follows:-

A. Eight (8) individuals (all of whom are Stockholders of the Company) have caused the Company to be formed for the purpose of obtaining a permit from the Federal Communications Commission for the operation of a radio station and for the purpose of operating such radio station.

B. Each of the Stockholders recognizes the importance to the Company and to the other stockholders of the Company of maintaining the integrity of the stock ownership in the Company.

C. Each of the Stockholders recognizes the beneficial Federal income tax advantages which would accrue if this corporation elected to be taxed as a small business corporation under Sub-chapter S of the Internal Revenue Code of 1954

now in effect. Each Stockholder recognizes that such an election cannot be made if more than ten (10) persons own either the legal or beneficial interest in the shares of stock of the Company.

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00) and other good and valuable considerations by each of the parties hereto to the other, in hand this day paid, the receipt and sufficiency of which is hereby severally acknowledged, and in further consideration of the several agreements herein contained, the parties hereto agree as follows:-

1. The Company and the Stockholders acknowledge that Paragraphs A, B and C hereinbefore set forth accurately represent the factual background within which this Agreement has been made.

2. Each Stockholder agrees that he will not sell, assign, encumber, hypothecate, transfer or otherwise dispose of all or any part of the stock in the Company held by him (or of any interest therein) except as may be expressly permitted by this Agreement or except as to transfers and the like as to which the Board of Directors of the Company then in office shall first have given its written consent.

All stock certificates evidencing the Stockholders' ownership of stock in the Company shall be endorsed with the following legend concurrently with the execution of this Agreement:-

"The shares represented by the within certificate are
subject to the terms

[182]

of an Agreement dated Mar. 19, 1965 between SUMNER FELDBERG, STANLEY FELDBERG, RICHARD A. SMITH, LEON M. FOX, NEWELL B. KURSON, ROLAND J. BOUCHER, JR., EDWARD F. PERRY, JR., AND WILLIAM F. MILLER and NATICK BROADCAST ASSOCIATES, INC., by the terms of which said shares of stock are restricted with respect to sale, hypothecation or other transfer. A copy of said Agreement may be examined at the office of said Company in Natick, Massachusetts."

3. Subject to the provisions of Paragraph 10. hereof, the restrictions on transfer imposed by Paragraph 2 hereof shall not apply to a transfer of such shares to any other stockholder or to devolution of title to such shares by will or through intestacy, provided, however, that any transferee shall enter into a valid and binding agreement with the Company, the effect of which will be that said shares of stock and the interest therein of said transferee shall thereafter be subject to the provisions of this Agreement, as if said transferee had originally been a party hereto.

4. The attachment of the interest of any Stockholder in said shares by a judgment creditor, or by any person claiming a lien thereon, or the filing of an involuntary petition in bankruptcy against a Stockholder or the appointment of any receiver in bankruptcy proceedings against a Stockholder, unless any of the said proceedings shall be promptly dismissed, or the filing of a petition in bankruptcy by a Stockholder, or the use of any insolvency act by a Stockholder or the breach by any Stockholder of any of the covenants, conditions or agreements contained herein,

[183]

shall ipso facto be deemed for all purposes to be, and shall be, an offer on the part of said Stockholder to sell his shares on the terms, provisions and conditions of Paragraphs 6, 7 and 8 below.

5. If any Stockholder shall desire to sell all or any part of his shares of stock of the Company to someone other than another Stockholder, he may sell the same only after obtaining a waiver of the restrictions contained in this Agreement from the Board of Directors of the Company or subject to the following provisions:-

(a) The party desiring to sell all or any part of his stock ("Selling Stockholder") shall serve notice upon the Company by certified mail, return receipt requested, indicating that he has a bona fide offer for the sale of such stock for cash, stating the number of shares to be sold, the name and address of the person desiring to purchase the same, and the sales price for such stock ("Offering Price"), and enclosing a photocopy of the offer that he has received. Such notice shall constitute an offer to sell such stock to the Company at the price determined in accordance with Paragraph 6. hereof ("Notice of Offer").

(b) Not later than thirty (30) days after receipt of the Notice of Offer, the Company may elect to purchase such shares upon the terms, provisions and conditions contained in Paragraphs 7 and 8 hereof by sending written notice of its election so to do to the Selling Stockholder

[184]

("Notice of Acceptance"). The purchase price for said shares shall be determined in the manner set forth in Paragraph 6. hereof.

(c) If the Company shall not elect to purchase such shares of stock, the Selling Stockholder shall be free to dispose of the shares of stock described in the Notice of Offer to the person named in said Notice and upon the terms and conditions set forth in said Notice, provided, however,

- (i) such transfer is made within sixty (60) days after the Company has declined to purchase said stock either by written notice to the Selling Stockholder or by failing to send the Notice of Acceptance within the time prescribed by Paragraph 5(b) hereof; and
- (ii) any transferee shall enter into an agreement with the remaining Stockholders and the Company, the effect of which will be that the shares of stock of the Company acquired by him shall thereafter be subject to the provisions of this Agreement, as if said transferee had originally been a party hereto.

6. The purchase price shall initially be established by notice from the Company to the Stockholder ("Designation of Purchase Price") sent not later than forty-five (45) days after the acceptance of the offer to sell or the exercise of the option to purchase ("Agreement Date"). Such purchase price shall be conclusively deemed to be the purchase price, if:

- (i) the Stockholder shall accept such purchase price, and acceptance shall

[185]

conclusively waive any defect in the form or manner of such notice;

- (ii) the Stockholder shall fail to notify the Company that he does not accept such purchase price, by sending such notice (otherwise in accordance with the terms of this Agreement) within thirty (30) days after the date on which notice was properly given by the Company to the Stockholder of such purchase price; and such failure so to notify the Company shall conclusively be deemed to waive any defect in the form or manner of such notice; or
- (iii) the purchase price so designated is the Offering Price under Paragraph 5 hereof.

If the Stockholder shall elect to dispute the purchase price within thirty (30) days as aforesaid, the purchase price for the stock to be sold shall be determined by Blackburn & Co., Inc., RCA Building, 1725 K Street, N.W., Washington, D.C., 20006 and R.C. Crisler & Co., Inc., 733 Third Avenue, New York, New York, or such other persons, firms, corporations or other entities as the parties may agree upon ("Arbitrators") in accordance with the then current standards prevalent for the valuation of radio stations of the type then being operated by the Company.

In making such determination, the Arbitrators shall be subject to and governed by the then applicable provisions of the Massachusetts General Laws governing arbitration, which provisions are currently embodied in Massachusetts General Laws (Ter. Ed.), Chapter 251.

[186]

If the Arbitrators shall be unable to agree upon the purchase price, said purchase price shall be the average of the purchase prices determined by each Arbitrator.

The Company agrees to make available to the Arbitrators such accounting records and financial statements of the Company as may be reasonably requested.

With respect to any result reached by the Arbitrators under the terms hereof, the parties agree that judgment may be entered in any court of competent jurisdiction upon the decision of the Arbitrators, it being the intent of the parties that any such determination shall be final and binding upon them as an award in arbitration proceedings conducted pursuant to, and under the authority of, the applicable General Laws of the Commonwealth of Massachusetts.

The Stockholder shall pay and be liable for the entire cost of the arbitration (including, without limitation, not only the fees of the Arbitrators, but the incidental expenses incurred by the Company), except if the Company elects to purchase the Stockholder's stock pursuant to Paragraph 5 hereof, in which case each party shall pay and be liable for one-half (1/2) of the cost of such arbitration as hereinbefore defined except in the following situation: If the Company shall have acquired shares of stock of the Company at a closing held within six (6) months prior to the receipt by the Company of the notice of offer, and if the purchase price for said shares shall have been determined by arbitration as hereinbefore provided, then the Stockholder shall pay and be liable for

[187]

all of such costs of arbitration if the price per share, computed with respect to the amount stated in the Designation of Purchase Price shall be not less than 110 per cent of the price per share as determined in the arbitration proceedings conducted incident to such prior purchase.

To assure payment of the cost of arbitration incurred by the Stockholder, the Company may deduct the amount of such cost from the purchase price otherwise due and payable for the shares of stock to be purchased.

7. A closing of a purchase and sale of the shares of stock to be purchased and/or sold hereunder pursuant to the foregoing provisions, shall be held in accordance with the following:

- (a) Where the purchase price shall have been agreed upon, or is treated as having been agreed upon, the closing shall take place fifteen (15) days following the date of the agreement upon purchase price, or the date on which the purchase price as established is treated conclusively as having been agreed upon, as the case may be.
- (b) Where the purchase price shall have been determined pursuant to arbitration, then the closing shall be held fifteen (15) days after the date on which a Court of competent jurisdiction enters a decree on the arbitration award.
- (c) If the date fixed for the closing hereunder, pursuant to the foregoing sub-sections of this Paragraph 7, shall be other than a regular business day, then the next succeeding business day shall be the date of closing.
- (d) The closing shall take place on the date determined in accordance with the foregoing provisions of this Paragraph 7, at 10:00 A.M. at the offices of the Company. At such time, such Stockholder shall convey his stock by such instruments as may be reasonably necessary to effect a transfer of the same free and clear of all encumbrances (and the Stockholder shall warrant that he has good right

[188]

to make such transfer), and at such time, the Company shall pay the purchase price in the fashion hereinafter prescribed.

8. Payment of the purchase price for the Stockholder's stock shall be made by bank or certified check or checks at the closing.

9. If a bona fide offer in writing shall be made to purchase all of the issued and outstanding stock of the Company and if the holders of more than sixty-six per cent (66%) of the issued and outstanding capital stock of the Company shall be in favor of accepting such offer, notice thereof shall be given to each of the other Stockholders.

If, within fifteen (15) days after the giving of such notice, the other Stockholders shall signify their willingness to accept such offer by notice to the other Stockholders, the sale shall be made in accordance with the said offer.

If any one or more of the other Stockholders do not so signify their willingness to accept such offer, such Stockholders shall be known as Negative Stockholders. The Stockholders who have so indicated a willingness to accept such offer shall be known as Affirmative Stockholders.

If there shall be Negative Stockholders, such Negative Stockholders shall be obligated to purchase, for cash, from each Affirmative Stockholder who shall

[189]

demand the same by notice to said Negative Stockholder, within fifteen (15) days after the expiration of said fifteen (15) day period, the interest of said Affirmative Stockholder at a price equal to the total net price offered for each share of the Company, multiplied by the number of shares then owned by said Affirmative Stockholder, which obligation shall be binding upon said Negative Stockholder.

If any Negative Stockholder shall fail to pay his proportionate share of the purchase price as above required, said Affirmative Stockholder or Stockholders shall have as an additional alternative remedy, the right at his or their election, to purchase the interest of said defaulting Negative Stockholder at the price equal to the total net price offered for each share of the Company multiplied by the number of shares then owned by such Negative Stockholder and upon the same terms and conditions as are contained in the offer to purchase all of the issued and outstanding stock of the Company. The obligation of the Affirmative Stockholder or

Stockholders to the Negative Stockholder shall only be to turn over to the Negative Stockholder the Negative Stockholder's pro rata portion of the purchase price received by the Affirmative Stockholder or Stockholders from the buyer of all of the issued and outstanding stock of the Company. For example, if the purchase of all of the stock of the Company is made upon terms providing for payment over a period of years, the obligation of the Affirmative Stockholder

[190]

or Stockholders to the Negative Stockholder shall only be to turn over to such Negative Stockholder amounts received with respect to the shares of the Negative Stockholder so sold if, as and when received.

If more than one Affirmative Stockholder shall exercise such election with respect to the interest of any defaulting Negative Stockholder, said Affirmative Stockholders shall purchase the interest of said defaulting Negative Stockholder in proportion to the interest of said Affirmative Stockholders in the total number of affirmative shares outstanding of the Company.

10. In order to insure that the corporation qualifies as a small business corporation under Subchapter S of the Internal Revenue Code of 1954, each Stockholder covenants and agrees, for himself, his heirs, executors, administrators and assigns to execute such instruments or documents as the Board of Directors may deem necessary, appropriate or advisable in order to obtain the benefits of said Subchapter S. Notwithstanding any other provision contained in this Agreement, each Stockholder, for himself, his heirs, executors, administrators and assigns, agrees that until August 31, 1970, or such earlier time as the Board of Directors of the Company may fix in a notice in writing to each of the Stockholders, he will not, without the written consent of such Board of Directors, sell, transfer or otherwise dispose of either the legal or beneficial interest in the shares of stock of the Company presently owned by him. Devolution of title

[191]

to such shares to the executors or administrators of a deceased Stockholder (but not to trustees under the will of a deceased Stockholder) shall not constitute a violation of this restriction if the transfer to such executors or administrators conforms to the requirements imposed by Paragraph 3 hereof and if the executors or administrators satisfy the obligations imposed upon them by this Paragraph 10 (including, without limitation, the execution of consents to the Subchapter S election within the time required by the then applicable provisions of the Internal Revenue Code of 1954 or rules and regulations promulgated pursuant thereto).

11. In addition to, and not in limitation of, all remedies provided under this Agreement for violation thereof, each Stockholder covenants and agrees to exonerate, indemnify and save each remaining Stockholder harmless of and from all liability for income taxes, including penalties and interest which may be sustained as a result of the loss of the Subchapter S election because of the transfer by the Stockholder of the whole or any part of the legal or beneficial interest in his shares of stock of the Company to a third person in violation of Paragraph 10 hereof.

12. Whenever by the terms of this Agreement notice shall or may be given either to the Company or the Stockholders, such notice shall be in writing, and shall be sent by registered or certified mail, return receipt requested, postage prepaid,

[192]

IF INTENDED FOR THE COMPANY, addressed to c/o Edward F. Perry, Jr., President, 203 Pond Street, Natick, Massachusetts;

IF INTENDED FOR Stanley Feldberg, addressed to him c/o New England Trading Corp., Mercer Road, Natick, Massachusetts;

IF INTENDED FOR Sumner Feldberg, addressed to him c/o New England Trading Corp., Mercer Road, Natick, Massachusetts;

IF INTENDED FOR Newell B. Kurson, addressed to him at 351 Newbury Street, Boston, Massachusetts;

IF INTENDED FOR Leon M. Fox, Esq., addressed to him at
65 Concord Street, Framingham, Massachusetts;

IF INTENDED FOR Richard A. Smith, addressed to him at
480 Boylston Street, Boston, Massachusetts;

IF INTENDED FOR Edward F. Perry, Jr., addressed to him at
203 Pond Street, Natick, Massachusetts;

IF INTENDED FOR William F. Miller, addressed to him at
Dedham Street, Dover, Massachusetts;

IF INTENDED FOR Roland J. Boucher, Jr., addressed to him
at 3 Draper Street, Natick, Massachusetts;

or to such other address or addresses as may from time to time here-
after be designated by any party hereto by like notice to all other parties.

Whenever by the terms hereof notice may or is required to be
given on or before a specified date, notice shall be properly given only
if deposited in the United States mails in conformity with the provisions
of this Paragraph on or before such date.

13. If any term or provision of this Agreement or the application
thereof to any circumstance shall

to any extent, be invalid or unenforceable, the remainder of this Agree-
ment, or the application of such term or provision to circumstances other
than those as to which it is held invalid or unenforceable, shall not be
affected thereby, and each term and provision of this Agreement shall be
valid and be enforced to the fullest extent permitted by law.

14. This Agreement is drawn under the laws of the Common-
wealth of Massachusetts and it shall be governed by and construed in
accordance with said laws.

15. All of the terms, provisions and conditions hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, administrators, executors, successors and assigns.

This instrument has been executed at Natick, Massachusetts, as of this 19th day of Mar., 1965, under seal, in any number of counterpart copies, each of which counterpart

[194]

copies shall be deemed an original for all purposes.

NATICK BROADCAST ASSOCIATES, INC.

By: /s/ Edward F. Perry, Jr. Pres.)
 /s/ Newell B. Kurson, Treas.)
 Hereunto duly authorized)
 /s/ Stanley Feldberg
 /s/ Sumner Feldberg
 /s/ Newell B. Kurson
 /s/ Leon M. Fox
 /s/ Richard A. Smith
 /s/ Edward F. Perry, Jr.
 /s/ William F. Miller
 /s/ Roland J. Boucher, Jr.

Natick Broadcast Associates, Inc.

Exhibit 4
III-1(c), 2(a)(b), 3, 4
(May 1965)

Financing Plan

Applicant estimates that it will cost \$116,500.00 to erect and operate the proposed Station until revenues equal expenditures. This includes the allocation of \$50,000.00 for hearing costs and contingencies.

The annexed balance sheet (Exhibit 4A) shows that Applicant has a net quick of \$11,495.86. This amount is on deposit in Applicant's name with the Commonwealth National Bank, 150 Causeway Street, Boston and was deposited for the express purpose of constructing and operating the Station.

The Commonwealth National Bank also will lend Applicant \$115,000.00 (See Exhibit 4B). In addition, RCA will extend Applicant equipment financing in the amount of approximately \$21,000.00. Applicant thus will have in excess of \$147,000.00 available to it, or \$30,000.00 above and beyond estimated costs.

[196]

183

[196]

[Received August 2, 1965, FCC]

EXHIBIT 4A

BALANCE SHEET
NATICK BROADCAST ASSOCIATES, INC.
March 19, 1965

ASSETS

Cash on hand and in banks	\$11,495.86
Organizational preparations and services	<u>3,424.14</u>
Total Assets	\$14,920.00

LIABILITIES

Capital Stock, without par value, 2,000 shares	<u>\$14,920.00</u>
Total Liabilities	\$14,920.00

[197]

184

[197]

[Rec'd-Aug. 2, 1965-FCC]

[Exhibit 4B]

COMMONWEALTH
NATIONAL BANK

Clyde M. Goldthwaite
President

April 22, 1965

Natick Broadcast Associates, Inc.
C/O Edward F. Perry, Jr., President
203 Pond Street
Natick, Massachusetts

Gentlemen:

In discussion with your officers, we are advised that Natick Broadcast Associates, Inc. plan to apply to the Federal Communications Commission for a construction permit to construct a first standard broadcast station on a frequency of 1060 kc in Natick, Massachusetts. Accordingly, we are interested in making available to you a loan which will facilitate the establishment of a workable and financially successful radio station in that community.

This will confirm that Commonwealth National Bank is willing to lend Natick Broadcast Associates, Inc. sums totaling \$115,000 upon receipt by you of a final and uncontestable grant from the Federal Communications Commission to establish a new broadcasting station in Natick. All loans will be at the prevailing rate of interest; it is understood that no portion of the principal amount will be due and payable during the first year of station operation, but, in any event, principal payments will commence twenty-four (24) months after date of notes.

We will write four loans in the following amounts with endorsements of the following individuals on the respective notes:

Loan - \$46,000.00 endorsement - Newell B. Kurson
Loan - \$23,000.00 endorsement - Sumner Feldberg
Loan - \$23,000.00 endorsement - Stanley H. Feldberg
Loan - \$23,000.00 endorsement - Richard A. Smith

Very truly yours,

COMMONWEALTH NATIONAL BANK

BY: /s/ Clyde M. Goldthwaite
President

CMG/mg

[198]

[Rec'd-Aug. 2, 1965-FCC]

[Exhibit 4B-App. A]

March 19, 1965

Natick Broadcast Associates, Inc.
c/o Edward F. Perry, Jr., President
203 Pond Street
Natick, Massachusetts

Gentlemen:

In connection with borrowing that is proposed to be done by Natick Broadcast Associates, Inc., we, the undersigned, severally, do agree that upon receipt by Natick Broadcast Associates, Inc. of a final and uncontestable grant from the Federal Communications Commission to establish a new broadcast station in Natick, Massachusetts, we will, upon your written request to each of us, severally endorse and/or guarantee any and all loans made by Natick Broadcast Associates, Inc. from Commonwealth National Bank and/or any other lending institution, such endorsement and/or guarantee to be in the following proportions as to each of us for such loan or loans as aforesaid and said loan or loans shall not exceed in the total aggregate of principal from all sources the sum of \$115,000 and on such rates of interest and repayment terms as you shall negotiate and agree to with such bank and/or lending institutions:

Stanley H. Feldberg	Twenty (20%) per cent.
Sumner Feldberg	Twenty (20%) per cent.
Newell B. Kurson	Forty (40%) per cent.
Richard A. Smith	Twenty (20%) per cent.

Witness our hands and seals.

/s/ Stanley H. Feldberg

/s/ Sumner Feldberg

/s/ Newell B. Kurson

/s/ Richard A. Smith

Natick Broadcast Associates, Inc.

Exhibit 5
IV-1(b), 2(b), 3(b),
10, 12
(May 1965)

Programming Proposal

I

The proposed station will operate daytime. Total hours of weekly operation will be 83 1/4. Weekly operation will total 72 1/4 hours. Sunday operation will be for 11 hours.

II

Annexed as Appendix A is a projected broadcasting schedule for a typical week of operation. This schedule reflects Applicant's opinion as to the type and character of programming currently best suited to meet area needs. However, as service area needs change, Applicant will recast its programming.

III

Applicant plans a staff of twelve employees divided among departments as follows:

Administrative	1 1/2
Technical	1 1/2
Programming	7
Sales	2

Part-time employees will supplement the staff as needs require. In addition, Applicant will hire additional employees if necessary.

[Received August 2, 1965, FCC]

Appendix A

PROPOSED PROGRAMMING FOR TYPICAL WEEK

Monday - Friday

5:58 AM	Sign On
6:00	News and Weather
6:05	Farm and Market Report
6:15	Reflections
6:20	Music
6:30	News, Sports & Weather
6:35	Music
6:50	Community Calendar
6:52	Music
7:00	News, Sports & Weather
7:10	Music
7:20	Commuters Report
7:22	Music
7:30	News, Sports & Weather
7:45	Music
8:00	News, Sports & Weather
8:05	Music
8:20	Sports Scoreboard
8:22	Music
8:30	Weather
8:32	Music
8:40	News Headlines
8:42	Music
9:00	News
9:05	Music
9:20	Sports Scoreboard
9:22	Music

[201]

188

[201]

9:30	Weather
9:32	Music
9:40	News Headlines
9:42	Music
9:50	Community Calendar
9:52	Music
10:00	News, Sports & Weather
10:05	Music
10:20	Education from A-Z
10:23	Music
10:30	Weather
10:32	Music
10:40	News Headlines
10:42	Music
11:00	News, Sports & Weather
11:05	Music
11:20	Sports Scoreboard
11:22	Music
11:30	Weather
11:32	Music
11:40	News Headlines
11:42	Music
12:00 PM	News, Sports & Weather
12:15	Music
12:30	Weather
12:32	Music
12:40	News Headlines
12:42	Music

1:00	News, Sports & Weather
1:05	Telephone Discussion Program
1:30	Weather
1:32	Telephone Discussion Program
2:00	News, Sports & Weather
2:05	Music
2:20	Education from A-Z
2:23	Music
2:30	Weather
2:32	Music and Country Store
2:40	News Headlines
2:42	Music and Country Store
3:00	News, Sports & Weather
3:05	Music and Country Store
3:20	Sports Scoreboard
3:22	Music and Country Store
3:30	Weather
3:32	Music
3:40	News Headlines
3:42	Music
4:00	News, Sports & Weather
4:05	Music
4:25	Stock Market
4:30	Weather
4:32	Music
4:40	News Headlines
4:42	Music
5:00	News, Sports & Weather

[203]

190

[203]

5:05	Music
5:20	Education From A-Z
5:23	Music
5:30	News, Sports & Weather
5:45	Music

[204]

SATURDAY

5:58 AM	Sign On
6:00	News, Sports & Weather
6:05	Farm & Market Report
6:15	Reflections
6:20	Music
6:30	Weekend Weather
6:32	Music
6:50	Community Calendar
6:52	Music
7:00	News, Sports & Weather
7:10	Music
7:30	News, Sports & Weather
7:45	Music
8:00	News, Sports & Weather
8:05	Music
8:20	Sports Scoreboard
8:22	Music
8:30	Weekend Weather
8:32	Music
8:40	Headlines
8:42	Music
9:00	News
9:05	Music
9:20	Community Calendar

9:22 Music
9:30 Weekend Weather
9:32 Music
9:40 News Headlines
9:42 Music

[205]

9:50 Weekend Travel
9:52 Music
10:00 News, Sports & Weather
10:05 Music
10:20 The Sportsman
10:22 Music
10:30 Weekend Weather
10:32 Music
10:40 News Headlines
10:42 Music
11:00 News, Sports & Weather
11:05 Music
11:20 Education From A-Z
11:23 Music
11:30 Weekend Weather
11:32 Music
11:40 News Headlines
11:42 Music
12:00 PM News, Sports & Weather
12:15 Music
12:30 Weekend Weather
12:32 Music
12:40 News Headlines
12:42 Music
1:00 News

[205]

192

1:05	Music
1:20	The Sportsman
1:22	Music

[206]

1:30	Weekend Weather
1:32	Music
1:40	News Headlines
1:42	Music
1:50	Community Calendar
1:52	Music
2:00	News, Sports & Weather
2:05	Music
2:20	Education from A-Z
2:23	Music
2:30	Weekend Weather
2:32	Music
2:40	News Headlines
2:42	Music
3:00	News, Sports & Weather
3:05	Music
3:20	Sports Scoreboard
3:22	Music
3:30	Weekend Weather
3:32	Music
3:40	News Headlines
3:42	Music
3:50	Travel
3:52	Music
4:00	News
4:05	Music
4:20	The Sportsman

4:22 Music
4:30 Weekend Weather

[207]

4:32 Music
4:40 News Headlines
4:42 Music
5:00 News, Sports & Weather
5:05 Music
5:20 Education from A-Z
5:23 Music
5:30 News, Sports & Weather
5:45 Music
5:58 Sign Off

[208]

SUNDAY

6:58 AM Sign On
7:00 News, Sports & Weather
7:05 Religious Music
7:30 Weather
7:31 Religious Music
8:00 News, Sports & Weather
8:05 Natick Council of Churches
9:00 News, Sports & Weather
9:05 The Catholic Hour
10:00 News, Sports & Weather
10:05 The Jewish Hour
11:00 News, Sports & Weather
11:05 Music
11:30 Weather
11:32 Music
12:00 PM News, Sports & Weather

[208]

194

12:10	Music
12:30	Weather
12:32	Music
12:40	News Headlines
12:42	Music
1:00	News, Sports & Weather
1:05	Music
1:20	Sports Scoreboard
1:22	Music
1:30	Weather
1:32	Music
1:40	News Headlines

[209]

1:42	Music
1:50	Community Calendar
1:52	Music
2:00	News, Sports & Weather
2:05	Music
2:20	Education from A-Z
2:23	Music
2:30	Weather
2:32	Music
2:40	News Headlines
2:42	Music
3:00	News, Sports & Weather
3:05	Youth Forum
4:00	News, Sports & Weather
4:05	Music
4:20	Sports Scoreboard

4:22	Music
4:30	Weather
4:32	Music
4:40	News Headlines
4:42	Music
5:00	News, Sports & Weather
5:05	Music
5:20	Education from A-Z
5:23	Music
5:30	News & Weather
5:40	Music
5:58	Sign Off

[210]

Natick Broadcast Associates, Inc.

Exhibit 6
IV-7
(May 1965)

Policy Respecting Discussion Programming

Applicant will provide time for the discussion of controversial issues of importance and concern to the Station's service area. Subjects will be selected for discussion programming on the basis of broadness and intensity of interest.

In its discussion programs, the Station will present the views of all responsible segments of opinion. This policy will apply equally when the Station editorializes. At such times, the Station will seek out spokesmen for conflicting or differing viewpoints and accord them comparable opportunities for voicing their opinions on the topic about which the Station editorialized.

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Appeal From Memorandum Opinions And Orders of The
Federal Communications Commission

JEROME S. BOROS

JEROME LIPPER

FLY, SHUEBRUK, BLUME AND
GAGUINE

30 Rockefeller Plaza
New York, New York 10020

Counsel for
Natick Broadcast Associates, Inc.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 26 1967

Nathan J. Paulson
CLERK

STATEMENT OF QUESTIONS PRESENTED

The parties to this Appeal have stipulated that the questions presented herein are as follows:

1. Whether the Commission's refusal in its February 14, 1966 and February 8, 1967 *Orders* (a) to allow Appellant to demonstrate the non-existence of prohibitive overlap, and (b) to afford Appellant's application comparative consideration with the mutually exclusive application of Home Service Broadcasting Corporation, was arbitrary, capricious and erroneous as a matter of law.

2. Whether the Commission's ultimate determination that Appellant's application, when originally tendered on May 10, 1965 violated the overlap provisions of 47 CFR 73.37(a), thereby rendering it unacceptable for filing, was arbitrary and erroneous.

3. Whether the Commission committed error in its February 14, 1966 and February 8, 1967 *Orders* in refusing:

(a) to designate Appellant's application for hearing to determine the extent of overlap, if any, and to grant a waiver of the Rules;

(b) to accept Appellant's retendered application *nunc pro tunc* as of May 10, 1965.

4. Whether the Commission's rejection of Appellant's application violated Section 303 of the Communications Act in that it did not select from amongst all qualified applicants, the one best suited to serve the paramount public interest, convenience and necessity (47 U.S.C. 303).

5. Whether the Commission's *Orders* deprived Appellant of due process, contrary to the requirements of Section 8 of the Administrative Procedure Act (5 U.S.C. 557).

By its *Order* of April 4, 1967, this Court approved the parties' prehearing stipulation, and directed that the stipulation shall control further proceedings in this case.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF QUESTIONS PRESENTED	i
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	3
STATUTES AND REGULATIONS INVOLVED	9
STATEMENT OF POINTS	9
SUMMARY OF ARGUMENT	10
ARGUMENT	
I It Was Error For The Commission To Reject Associates' Application — Which At All Times Actually Conformed With All Commission Rules — Solely Because The Application Initially Ap- peared To Violate The Overlap Rule To A <u>De</u> <u>Minimis</u> Degree. In Like Situations The Overlap Rule Uniformly Has Been Relaxed To Avoid A Forfeiture Of Hearing Rights; Non-Discrimin- atory Application Of This Policy Was Required — But Denied — Here. In The Absence Of Such Even - Handed Treatment, At A Minimun, As- sociates Was Entitled To A Hearing To Determine Whether <u>Apparent</u> Overlap Existed And, If So, The Appropriateness Of A Waiver	12
II The Commission Erred In Assuming That The Policy Considerations Embalmed In The Over- lap Rule Overrode The Policy Factors Under- lying The Commission's Statutory Obligation To Select From Amongst Otherwise Qualified Appli- cants The Applicant Which Would Provide Super- ior Service To The Public. In Any Event, The Commission Could Not Choose Between Conflic- ting Policies Without Reason And Without Enunc- iation Of The Basis For Its Decision	19
III The Commission Erred In Concluding That Signi- ficant Overlap Existed, In The Absence Of Findings Of Fact	20

	<u>Page</u>
CONCLUSION	21
APPENDIX OF STATUTES AND REGULATIONS INVOLVED	A-1
SUPPLEMENT — Texts of Recent Decisions and Related Materials	S-1, S-35

TABLE OF AUTHORITIES

Cases:

Johnston Broadcasting Co., v. Federal Communications Commission, 85 U. S. App. D. C. 40,175 F 2d 351 (1949)	13, 14
*Melody Music, Inc. v. Federal Communications Commission, 120 U. S. App. D. C. 241, 345 F. 2d 730 (1965)	17
National Labor Relations Board v. Remington Rand, Inc., 94 F. 2d 862 (C. A. 2, 1938), <u>cert. den. sub nom.</u> Remington Rand, Inc. v. NLRB, 304 U. S. 576 (1938)	18
*Saginaw Broadcasting Co. v. Federal Communications Commission, 68 App. D. C. 282, 96 F. 2d 554 (1938) <u>cert. den. sub nom.</u> , Gross v. Saginaw, 305 U. S. 613 (1938)	21
*Secretary of Agriculture v. United States, 347 U. S. 645 (1954)	20
*United States v. Storer Broadcasting Co., 351 U. S. 192 (1956)	18

Decisions of Regulatory Agencies:

Conroy Airman Certificate, 5 C.A.B. 172 (1941)	18
*Fine Music, Inc., 9 Pike & Fischer RR 2d 219 (1966)	15
*Johnston Broadcasting Co., 3 Pike & Fischer RR 1784 (1947); 5 Pike & Fischer RR 1320 (1950)	13, 14
*Molly Pitcher Broadcasting Company, Inc., (F. C. C. Report No. 7980, released Feb. 10, 1967)	16, 17
Mushingim Broadcasting Company, 19 Pike & Fischer RR 552 (1959)	13

*New York University (FCC 67-607, released
May 23, 1967) 17

*Orange Nine, Inc., 9 Pike & Fischer RR 2d
1157 (1967) 19

Statutes:

Administrative Procedure Act, 80 Stat. 378, 5
U.S.C. 551 et seq. 2, A-1
Section 2 1
Section 8 2
Section 10

Communications Act of 1934, as amended, 48 Stat.
1064, 47 U. S. C. 151 et seq. A-1, 20
Section 303 2
Section 402

Rules and Regulations:

Rules and Regulations of the Federal Communications
Commission, 47 C.F.R. (1966 Supp.) 2, 3, A-2
Section 73.37 (a) A-2
Section 73.183 (c)

Other Authorities:

3 Wigmore on Evidence, §285 (1940) 18

* Cases and other authorities chiefly relied upon.



BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Appeal From Memorandum Opinions And Orders of The
Federal Communications Commission

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Natick Broadcast Associates, Inc.,¹ pursuant to the provisions of Section 402(b)(1) of the Communications Act of 1934,

¹ For convenience hereinafter, Natick Broadcast Associates, Inc. will be called "Associates" or "Appellant"; the Federal Communications Commission will be called "Commission" or "Appellee"; and a non-party to this proceeding but an applicant before the Commission, whose application is relevant to this matter, Home Service Broadcasting Corporation, will be called "Corporation."

as amended, (47 U.S.C. 402(b)(1)), and Section 10 of the Administrative Procedure Act (5 U.S.C. 702) from three orders of the Federal Communications Commission namely:

- (i) an *Order* dated July 2, 1965,² refusing to accept Associates' application for filing on the ground that it did not conform with Section 73.37(a) of the Commission's Rules (47 CFR 73.37(a)), which prohibits the acceptance of applications involving overlap over land of specified broadcast station contours;³
- (ii) a *Memorandum Opinion And Order*, released February 14, 1966, denying reconsideration of the prior rejection of Associates' application and corollarily refusing to accord it comparative consideration with Corporation's pending and conflicting application;
- (iii) a *Memorandum Opinion And Order*, released February 8, 1967, denying Associates' *Petition For Relief* and reaffirming the prior rejections of Associates' application.

A *Notice of Appeal* was filed in this Court on March 10, 1967.

² The *Order* consisted of a letter returning the application. Even so, the letter constitutes an "Order" within the meaning of Section 402(b) of the Communications Act of 1934 (47 U.S.C. 402(b)) since it is a "final disposition" by an agency. Section 2 of the Administrative Procedure Act (5 U.S.C. 551).

³ Section 73.37(a) provides, in pertinent part:

"[N]o application will be accepted for a new station . . . if the proposed operation would involve overlap of signal strength contours with any other station . . .".

STATEMENT OF THE CASE

This appeal involves the Commission's rejection of Associates' timely tendered application for a construction permit for a first radio station at Natick, Massachusetts, and the resultant foreclosure of Associates' right to comparative consideration of its proposal with Corporation's pending application. The two applications were mutually exclusive in that each specified identical broadcast facilities, *i.e.*, 1060 kc., with 1 kw power, daytime, in Natick, Massachusetts.

Corporation's application was filed first. It was tendered to the Commission on September 23, 1964, but as originally tendered, it was not acceptable for filing. Two months after the application had been tendered, the Commission, by letter of November 23, 1964, informed Corporation that a technical flaw precluded the application's acceptance; Corporation was accorded "twenty (20) days . . . to permit consideration of the problem . . .". The full text of the Commission's letter follows:

"This is in regard to the application tendered for filing on September 23, 1964, for construction permit for a new standard broadcast station to operate on 1060 kilocycles, 1 kilowatt of power, daytime only at Natick, Massachusetts.

"It is indicated in your application that the proposed antenna system would radiate 175 mv/m/kw and that this value of radiated field would not cause the proposed 0.005 mv/m contour to overlap the 0.1 mv/m contour of Station WRCV, Philadelphia, Pennsylvania. However, utilizing Figure 8 of Section 73.190 of the Commission Rules *it appears that the proposed antenna radiation would be more nearly 190 mv/m/kw. On the basis of this higher efficiency, the proposed 0.0005 mv/m contour would overlap the 0.1 mv.m contour of WRCV. Pursuant to the provision of Section 73.37 (a) of the Commission's Rules, such overlap would render your application unacceptable for filing. (Italics added).*

"Since you did not clearly indicate whether the radiation would be restricted to a value of 175 mv/m,

further action on your application will be withheld for a period of twenty (20) days from the date of this letter to permit consideration of the problem noted herein. Failure to reply within this period of time will render your proposal subject to dismissal." [JA-92].*

Corporation responded by an amendment "modifying the antenna height." The modification actually entailed a forty percent decrease in antenna height — from 230 feet to 140 feet. [JA-93]

As a result of this drastic paring of antenna height, Corporation's application was accepted for filing. However, since the application had been retained by the Commission pending amendment, Corporation was not obliged to retender the application for filing and thus was spared repetition of the two month processing period, which had preceded Commission review of the application, as initially submitted.

By *Public Notice*, released April 2, 1964 (FCC 65-267), Corporation's application was placed on the Commission's May 10, 1965 "cut-off" list. By virtue of this listing, any other mutually-exclusive application was required to be filed by the prescribed date in order to receive comparative consideration with Corporation's application.

Prior to the time the cut-off list was published, Associates already had been organized. Indeed, Associates was a successor to an earlier unincorporated group of the same name formed in the summer of 1962 by five Natick residents to bring a first radio outlet to the community. Because of Commission restrictions on the processing of applications for both AM and FM stations, three of these venturers early lost interest in the project, but two of them— Edward F. Perry, Jr. and Roland J. Boucher, Jr. — who had roots in broadcasting persisted. By early fall 1964, the Commission had recommenced the processing of

* References to the Joint Appendix will be preceded by the letters "JA".

AM applications and, about this time, Perry and Boucher learned of the availability and suitability of AM frequency 1060 kc. for use in Natick. They thereupon set about recruiting co-venturers and they soon enlisted the participation of William F. Miller, a graduate of Boston University's School of Communications, an employee of a Boston radio-television station, and an area resident. Leon M. Fox, a long time Natick resident, joined the venture as a local counsel. [JA-76]

At this juncture, work toward preparation of the application was initiated and Barkley & Dexter Laboratories, Inc., a Fitchburg, Massachusetts engineering firm, whose qualifications were known to the Commission, was retained to prepare the technical portions of the application. Four additional participants -- Sumner Feldberg, Stanley Feldberg, Newell B. Kurzon and Richard A. Smith -- each of whom had both business interests and lived within the proposed service area, were also recruited at about this time. In March 1965, the eight formally organized Associates, a Massachusetts corporation, for the express purpose of applying for an authorization for a Natick radio station. [JA-77, 139-43]

Preparatory to making application, local programming needs were canvassed extensively through a series of personal interviews, involving the participation of each one of Associates' eight stockholders. In excess of one hundred such interviews were conducted and the results were used in blocking out Associates' programming proposal. [JA-77]

Each stockholder in Associates also participated in recruiting members of an Advisory Council, which Associates organized to serve on a continuing basis as a sounding board reflective of local needs. Over forty-five community leaders joined this council, including residents of Natick, Framingham, Westwood, Sherborn, Ashland, Wellesley, Newton, Needham, Medfield, Dover, Medway, Maynard -- all communities within the proposed service area. Included were representatives of the area's civic, religious, educational, professional and business life. [JA-77, 90-91] On April 29, 1965, prior to finalization of Associates' application, a dinner meeting of

several hours was held at which the opinions of the Advisory Council were freely solicited and freely offered. These opinions, too, were utilized in shaping Associates' programming proposal. [JA-77]

On May 10, 1965, Associates tendered its application for filing. [JA-77, 126] To the best of Associates' information, knowledge and belief, the application, as tendered, was complete in all respects. All sections of the application form were submitted, all applicable questions were fully answered and all exhibits were supplied. [JA-126-195, 4-21] The application thus provided complete information about Associates' legal, financial and technical qualifications, and, in the last respect, specifically represented that the application was in complete conformity with the Commission's engineering rules, including the rules proscribing overlap of specified broadcast station contours. This latter showing was based upon a Commission soil conductivity map which purported to depict the ground conductivity of broadcast signals over the entire United States. [JA 7-8]

By letter of July 2, 1965, the Commission advised Associates that its application was unacceptable for filing. The Commission said in pertinent part:

"A *preliminary* examination of the application reveals that, contrary to the showing contained therein, the proposed 0.005 mv/m groundwave contour would overlap the 0.1 mv/m groundwave contour of Station KYW, Philadelphia, Pennsylvania, 1060 kc. 50 kw DA-1, Unlimited time. Commission study indicates that the proposed 0.005 mv/m contour would extend a greater distance than indicated by the applicant[']s studies. In this regard, it appears that you may not have computed the extent of the proposed 0.005 mv/m contour along certain critical azimuths involving *salt water paths*" (italics added). [JA-29]

However, unlike Corporation — and other applicants before the Commission — Associates was not afforded an opportunity to clarify or supplement its showing, or "to permit consideration of the problem

noted herein." Instead Associates' application was returned out-of-hand.⁴ [JA-92]

On August 2, 1965, Associates timely petitioned for reconsideration. [JA-31-64] Its *Petition For Reconsideration* showed that it had taken field intensity measurements, and that these measurements confirmed Associates' earlier representation that its application, as originally submitted, did not cause prohibitive overlap. [JA-31-38] Accordingly, Appellant re-tendered its original application without change. That is, in contrast to Corporation, Appellant did not pare tower height or otherwise amend its application to bring it into conformity with the Commission's Rules. Associates' application was re-tendered without any alteration whatsoever. The only difference between the initial tender and the retender lay in supportive evidence — the reconsideration petition contained data reinforcing of Appellant's original representation relating to absence of overlap. [JA 33-64] Consequently, Associates urged the Commission to reverse its prior determination and to accept Associates' application for filing.⁵

Corporation opposed the *Petition For Reconsideration*, but did not controvert, in the least, Associates' showing with respect to the absence of overlap. [JA 67-68] Nonetheless by a *Memorandum Opinion And Order*, released February 14, 1966, the Commission denied reconsideration and again rejected Associates' application. [JA 71-73] This time the Commission abandoned its contention that Associates' application violated the "overlap rules." Instead, the Commission held that Associates'

⁴ The apparent overlap caused by Appellant's proposal was to the same Station as had been involved in an overlap situation with Corporation. In the interim, however, the Station's call letters had been changed from WRCV to KYW.

⁵ In its pleading, Associates pointed out that its original application had been timely filed for comparative consideration with Corporation's application but in the event any doubt existed as to whether that date governed, it requested that the re-tendered application be treated nunc pro tunc as of the original "cut-off" date, of May 10, 1965. [JA 32]

application "must be judged" by the date on which the reconsideration petition had been filed. Since that date was subsequent to the "cut-off" date, the Commission ruled that Associates' application was to be treated as late-filed and not acceptable for comparative consideration with Corporation's application.⁶

On March 16, 1966, Associates timely filed a *Petition For Relief* [JA-74-98] with the Commission, urging the agency to accept the application for filing, among other grounds, for the reason that, its acceptance would enable the Commission to choose the better applicant as between otherwise qualified applicants. [JA 75-76] Concomitantly, *Associates reemphasized that, its application, at all times, including as originally filed on May 10, 1965, had been in complete compliance with all the Commission's rules, including the overlap rules, and that such actual conformity rather than apparent non-conformity should determine acceptability for filing.* [JA-75] Moreover, Associates maintained that initial rejection of its application had been unwarranted since the *apparent* overlap, upon which the Commission relied, was *de minimis*, as was underscored by the absence of any objection on overlap grounds by Westinghouse Broadcasting Corporation, licensee of Station KYW, which theoretically had been the victim of the *apparent* overlap. [JA 80] Associates therefore contended that the Commission alternatively should have:

(a) treated Associates on a par with Corporation by extending to Appellant the same opportunity previously granted Corporation to clarify its showing with respect to the purported overlap; or,

(b) completely disregarded the *apparent* overlap in view of its nominal nature (20 square miles); or,

⁶ On March 16, 1966, Associates lodged an appeal from the Commission's July 2, 1965 and February 14, 1966 Orders which rejected its tendered application. *Natick Broadcast Associates v. Federal Communications Commission*, Case No. 20,053 (C.A.D.C.) By motion filed February 28, 1967, Associates requested this Court to dismiss without prejudice the above captioned appeal. The Court did so by Order dated March 27, 1967.

(c) at least designated Appellant's application for hearing to determine the extent of overlap, if any, and the appropriateness of a waiver of the Rules.

Finally, Associates pointed out that, in any event, both established doctrine and equitable principles called for acceptance of its retendered application *nunc pro tunc* as of May 10, 1965, the cut-off date. [JA 80-81]

By a *Memorandum Opinion And Order* released February 8, 1967, the Commission denied Associates' *Petition For Relief* on the ground that the Commission lacked discretion to accept Associates' application, as originally tendered for filing. [JA 115] At the same time without making any findings of fact, the Commission rejected Appellant's contention that only apparent *de minimis* overlap had been involved in the first place. Other contentions of Associates either expressly were rejected or silently were disregarded.

STATUTES INVOLVED

The relevant portions of statutes involved are set forth as the Appendix hereto — at the end of this Brief.

STATEMENT OF POINTS

- I. It was error for the Commission to reject Associates' application — which at all times actually conformed with all Commission Rules — solely because the application initially appeared to violate the overlap rule to a *de minimis* degree. In like situations, the overlap rule uniformly has been relaxed to avoid a forfeiture of hearing rights; non-discriminatory application of this policy was required — but denied — here. In the absence of such even-handed treatment, at a minimum, Associates was entitled to a hearing to determine whether *apparent* overlap existed and, if so, the appropriateness of a waiver.

- II. The Commission erred in assuming that the policy considerations embalmed in the overlap rule overrode the policy factors underlying the Commission's statutory obligation to select from amongst otherwise qualified applicants the applicant which would provide superior service to the public. In any event, the Commission could not choose between conflicting policies without reason and without enunciation of the basis for its decision.
- III. The Commission erred in concluding that significant overlap existed, in the absence of findings of fact.

SUMMARY OF ARGUMENT

This proceeding presents a factual situation identical with, and a result incompatible with, a multiplicity of contemporaneous cases decided by the Commission. In case after case, including proceedings decided before, after, and during the pendency of the instant matter, the Commission either *sua sponte* or in response to an applicant's plea, has allowed applicants to cure *actual* overlap violations, and correlatively has accepted applications for filing in order to prevent forfeiture of the right to compete for a public grant. Appellant was entitled to no less equitable treatment, particularly since its application *actually never violated, in any way or to any extent, the Commission's overlap rules*, and any *apparent* overlap was *de minimis*. Therefore, once the Commission became aware that *only an error in presentation was involved*, consistency with precedent mandated acceptance of Associates' application.

The case for acceptance of Associates' application is strengthened by the *de minimis* nature of the *apparent* overlap. Associates demonstrated that any *apparent* overlap reflected in its initial presentation was negligible, and the correctness of its position was confirmed by the silent acquiescence therein of Westinghouse Broadcasting Corporation ("Westinghouse"), owner of Station KYW, which, according to the Commission, was victimized by the *apparent* overlap. These considerations gave rise

to *apprima facie* question as to the existence of overlap. The Commission's developmental responsibilities in the field of broadcasting required it to grant Associates a hearing on this point rather than dismissing its application summarily. The need for such a hearing is dramatized by the repeated failure of the Commission to support factually its conclusion that a material amount of *apparent* overlap existed.

II

The Commission erred in assuming that the policy considerations embalmed in the overlap rule override the policy factors underlying the Commission's statutory obligation to select from amongst otherwise qualified applicants the applicant which would provide superior service to the public. The Commission traditionally has accorded primacy to providing optimum service to the public and, to this end, consistently has facilitated the acceptance of applications, despite technical flaws, in order that it may have the widest, possible choice in licensing, among otherwise qualified applicants. In any event, the Commission could not choose between conflicting policies without possessing and stating a reason therefor.

III

The Commission erred in concluding that significant overlap existed in the absence of findings of fact. There is no factual support for the Commission's conclusion that Appellant's application, as originally tendered, apparently entailed substantial overlap with Station KYW.

ARGUMENT

I

It Was Error For The Commission To Reject Associates' Application — Which At All Times Actually Conformed With All Commission Rules — Solely Because The Application Initially Appeared To Violate The Overlap Rule To A *De Minimis* Degree. In Like Situations Overlap Rule Uniformly Has Been Relaxed To Avoid A Forfeiture Of Hearing Rights; Non-Discriminatory Application Of This Policy Was Required — But Denied — Here. In The Absence Of Such Even-Handed Treatment, At A Minimum, Associates Was Entitled To A Hearing To Determine Whether *Apparent* Overlap Existed And, If So, The Appropriateness Of A Waiver.

The narrow question presented by this appeal is whether the Commission is justified in rejecting summarily a substantively conforming application because of initial, apparent, *de minimis* overlap which promptly was cured. The broad and overriding question presented by this appeal is whether the Commission is justified in discriminating between parties without a reason geared to implementing the paramount public purpose of the Communications Act. The instant appeal fuses finely these questions.

A

It is undisputed that Associates' application, as initially tendered for filing, actually accorded with the Commission's overlap rule. Any doubt on this score was dispelled when Appellant supported its reconsideration petition with uncontroverted evidence documenting the absence of overlap.

The Commission nonetheless persisted in its exclusionary policy — on wholly new grounds. It alchemized virtue into vice, holding, contrary to long established doctrine, that Associates' reinforcement of its earlier representation about non-existence of overlap came too late. It ruled that material in the nature of an erratum — which repeatedly had

been accepted by the Commission — in like contexts, was unacceptable in the instant context.

In deciding against acceptance of the material *nunc pro tunc*, the Commission broke abruptly with precedent. For, it has been settled doctrine for approximately twenty years that even material so vital to an application that "the application could not be considered . . . valid . . . without the . . . material" *Muskingum Broadcasting Company*, 19 Pike & Fischer RR 552, 556 (1959), may be submitted on a *nunc pro tunc* basis. *Johnston Broadcasting Co., v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

The *Johnston* case not only illustrates this principle but underscores the gap between past practice and the Commission's instant refusal to accept Appellant's application *nunc pro tunc*. *Johnston* dealt with the question whether the Commission should dismiss an application because it had not been verified in accordance with the requirements of statute and Commission rule. In the Commission's language, the facts were that the application (3 Pike & Fischer RR 1784, 1791 (1947)):

" . . . sworn to . . . on August 24, 1946, referred to an attached engineering report, which was not then in existence. The engineering study was conducted [two months later] during August and September, 1946, by A. D. Ring, applicant's consulting engineer, and physically attached to the application. The application together with the engineering report, was filed with the Commission on October 2, 1946."

Although this pattern of conduct contravened the Communications Act and Commission regulations, the Commission initially concluded (3 Pike & Fischer RR 1784, 1791 (1947)):

" . . . we believe that the technicality involved here should not operate to preclude the Commission from comparing the relative merits of the two applicants . . ."

Upon reconsideration, the Commission adhered to this principle stating (3 Pike & Fischer RR 1793, 1794 (1948)):

"... Johnston Broadcasting Company has not been prejudiced in the presentation of its application by this technicality . . . The Johnston application had a full and complete opportunity . . . to win a decision in a comparative hearing upon the respective merits of the two applications. We do not believe that said administrative procedure would warrant our adhering to the high degree of technical construction urged by petitioner under this circumstances."

This principle was carried forward and constituted the gravamen for the Commission's ultimate disposition of the matter. Following appeal to this Court in *Johnston Broadcasting Co. v. Federal Communications Commission*, *supra*, and remand, the Commission opted to permit the basic defects in the application to be cured via grant of an amendment *nunc pro tunc*. *Johnston Broadcasting Co.*, 5 Pike & Fischer RR 1320 (1950).

The instant departure from that standard is rationalized by the Commission on deterrent grounds. Notwithstanding that Appellant had contended that it was unforeseen — and unforeseeable — that its engineers would depict non-existent overlap, and that detection of such error, let alone deterrence by Associates' layman principals, was impossible, the Commission assumed that severity in this particular case, would lead to "more carefully prepared engineering submissions." [JA 122]

This pivotal assumption not only lacks factual roots, but its emphasis on meting out punishment for technical error also reflects a reversion to Lord Coke's day when form was exalted over substance. But administrative agencies, including the Commission, were chartered in order to circumvent such procedural petrification. Not technical mishap but substantive merit is the proper touchstone for decisions under the Communications Act. This is the philosophy of the *Johnston* case

and the philosophy that has animated Commission policy over the years. The cases are legion that a competing applicant has no right, under the Communications Act, to a victory by default.

To be sure, the situation is otherwise in the case of intervening equities but here such equities neither exist nor have been claimed. No action was taken by any party — to its detriment — in reliance on Appellant's inadvertency.

For this reason alone, the Commission was obliged to grant Appellant the same opportunities to redress its technical error as were accorded in the *Johnston* case, and as consistently have been accorded to other applicants under like mitigating circumstances. But this the Commission did not do. Its instant action contrasts polarily with its disposition of parallel cases.

This is strikingly illustrated by *Fine Music, Inc.*, 9 Pike & Fischer RR 2d 219 (1966) (S-1),⁷ which was decided by the Commission approximately forty-five days before the definitive decision below in this case. In *Fine Music* the Commission, in order to avoid a forfeiture of hearing rights, *on its own motion*, waived the "cut-off" rule, and, on the basis of new engineering data accepted an application previously rejected on overlap grounds. The operative facts are on all fours with those underlying this appeal.

In *Fine Music*, A tendered an application which was mutually exclusive with B's pending application which, in turn, was mutually exclusive, with C's pending application. However, at the time of A's tender, which occurred on B's cut-off date, C's cut-off date already had passed, and the Commission consequently rejected A's application on the ground

⁷ For the Court's convenience the full text of particularly apposite decisions and papers have been included in a Supplement following the Appendix. The designation "S-" followed by a page number indicates the page in the Supplement at which the decision or paper can be found.

of lateness because of the interlink between B and C. A's application contained engineering data designed to negate any such interlink but the Commission did not regard the data as persuasive. Thereafter, A re-tendered its application, together with new engineering data, which convinced the Commission that there had been no overlap between B and C at the time A first had tendered its application. However, since, as noted, A's initial tender had occurred on B's "cut-off" date, the re-tendered application also was unacceptable for filing on lateness grounds.

The Commission surmounted this obstacle by waiving the "cut-off" rule on its own motion. Its rationale was that the equities "argue forcefully for a waiver of the 'cut-off' rule and *nunc pro tunc* acceptance of . . . [C's] application."⁸

This doctrine was not extended — nor even mentioned — by the Commission in its disposition of the instant matter. Yet, only two days after its definitive decision below in this case, the Commission returned to the doctrine of *Fine Music*, by accepting for filing the application of *Molly Pitcher Broadcasting Company, Inc.* (BP-17,490), notwithstanding that on the cut-off date, when the *Molly Pitcher* application had been tendered, it violated the Commission's overlap rule. (S-8,15). As in the instant situation, the *Molly Pitcher* application, as initially tendered, negated overlap, but unlike the situation presented by Associates' application, overlap actually inhered in the *Molly Pitcher* proposal, as a competing applicant stressed in a pleading requesting rejection of the *Molly Pitcher* proposal. In response, *Molly Pitcher* conceded the overlap but tendered an engineering amendment "that now removes all possibility of that overlap." The Commission, without explanation, subsequently accepted the application for filing.

Even as this brief is written, the Commission carries forward its unbroken line of decisions — save for the instant case — allowing post

⁸ See S-3, par. 4.

cut-off amendments to cure overlap violations and accepting the reformed applications *nunc pro tunc*. Thus, in *New York University* (FCC 67-607, released May 23, 1967) (S-16), the Commission initially had rejected the timely tendered application of Farleigh Dickinson University on overlap grounds. However, upon late retender of the application, which had been recast to eliminate overlap, the Commission accepted it *nunc pro tunc*.

The instant case thus stands alone. And it stands alone without reason or justification. The operative facts in this case are no less compelling than in the above-cited cases. Indeed, this case is at least, *a fortiori* to *Molly Pitcher*, for here, Appellant's original application *actually* involved no overlap.

Under the circumstances, this case should be remanded to the Commission with instructions that Appellant's application be accepted for filing. Parity of treatment should be a byword in Commission regulation. *Melody Music, Inc. v. Federal Communications Commission*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965).

B

Short of instructing the Commission to accept Appellant's application outright, this Court should instruct the Commission to afford Associates a hearing as to whether its application, as originally tendered, *apparently* violated the Commission's overlap rule and, if so, whether a waiver thereof was warranted. Associates has *prima facie* established its right to such a hearing for it alleged below that any apparent overlap reflected by its application, as tendered, was *de minimis*. [JA 94-95] The reasonableness of this allegation is endorsed by the silent acquiescence therein of Westinghouse, owner of Station KYW, which, according to the Commission would encounter the overlap. [JA 29] Moreover, the Commission's continued failure (which is discussed further in Point III, *infra*), to make countervailing findings of

fact, constitutes proof of the highest order that any overlap was *de minimis*. *Wigmore On Evidence* (3d ed. Sec. 285);⁹ *National Labor Relations Board v. Remington Rand, Inc.*, 94 F.2d 862 (CA 2, 1938), *cert. den. sub nom. Remington Rand Inc., v. NLRB*, 304 U. S. 576 (1938);¹⁰ *Cocroft Airman Certificate*, 5 CAB 172 (1941).¹¹

A hearing on this score therefore is required. Appellant has met the threshold test of alleging sufficient facts — the absence of even *seeming* overlap of a legally cognizable nature — to warrant a hearing. For a hearing is mandated, if allegations have been made which, if true, are sufficient to justify a waiver of the overlap rule. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

⁹ "The non-production of evidence that would naturally have been produced . . . permits the inference its tenor is unfavorable to the party's cause . . ."

¹⁰ In an opinion by Judge Learned Hand, the Court of Appeals for the Second Circuit Court held that, in determining whether an employer fostered the creation of a company union, the employer's silence concerning its connection with a lawyer who assisted in the union's formation and subsequently represented the employer, constituted a significant factor to be weighed against the employer.

¹¹ In a proceeding based on a complaint by the Administrator of Civil Aeronautics to determine whether a commercial pilot's certificate should be suspended or revoked, the Civil Aeronautics Board held that the Administrator's failure to call as a witness a party who had been subpoenaed and was present at the hearing compelled the conclusion that the witness would have been adverse to the Administrator.

II

The Commission Erred In Assuming That The Policy Considerations Embalmed In The Overlap Rule Overrode The Policy Factors Underlying The Commission's Statutory Obligation To Select From Amongst Otherwise Qualified Applicants The Applicant Which Would Provide Superior Service To The Public. In Any Event, The Commission Could Not Choose Between Conflicting Policies Without Reason And Without Enunciation Of The Basis For Its Decision.

In refusing to waive its overlap rule, the Commission deprived itself irrevocably of the opportunity to enfranchise the better applicant, as between otherwise qualified applicants, to utilize the sole broadcast frequency available in Natick. It thus straightjacked itself into a "Hobson's choice." In doing so, it consciously preferred the restrictive policy underlying the overlap rule to the expansive policy which, over the years, has animated it in its administration of the Communications Act. That is, the Commission traditionally has accorded primacy to providing optimum service to the public and, to this end, consistently has overlooked technical obstacles to acceptance of applications, so that, in licensing, it might have the widest range of choice among otherwise qualified applicants.

The merit of this latter policy is well stated in *Orange Nine, Inc.*, 9 Pike & Fischer RR 2d 1157 (1967).¹² There the Commission was confronted with the question whether it should bar Weiss, one of eight applicants, from a comparative proceeding, because of a technical deficiency in his application, as tendered, on the "cut-off" date, which he subsequently had corrected. The Commission concluded (S-24-25):

"We think that this is too important a matter to warrant dismissal of bona fide applications on technical grounds; the public interest lies in enabling us to

¹² S-20.

make a choice among these applicants on the basis of merit, rather than by attrition. Charles W. Jobbins et al, FCC 64-743, 3 RR 2d 302. Moreover, since our rules provide an unlimited right to amend prior to designation for hearing Weiss merely exercised his rights and perfected his application to the extent of eliminating this objection to it. This, too, is in the public interest . . ."

This policy declaration directly reflects statutory command. Section 303(g) of the Communications Act broadly instructs the Commission, "to encourage the larger and more effective use of radio in the public interest." The "*more effective use*" (italics added) of a given frequency can be properly determined only if the Commission exercises broad scope in selecting a licensee.

Accordingly, it was error for the Commission to subordinate the statutorily derived policy of choosing a licensee from among as many applicants as possible to the restrictive administrative policy of the overlap rules. There is no warrant for such action.

In any event, it was impermissible for the Commission to choose between conflicting policies without both a reason and a statement of the reason. On its face, the Commission's action accordingly is defective and cannot stand. *Secretary Of Agriculture v. United States*, 347 U.S. 645 (1954).

III

The Commission Erred In Concluding That Significant Overlap Existed, In The Absence Of Findings Of Fact.

In passing on this matter below, the Commission consistently has concluded that at the time Associates originally tendered its application, it *apparently* caused more than *de minimis* overlap to Station KYW, Philadelphia. Equally as consistently the Commission has neglected to support its conclusion with findings of fact. At no time has the Commission made any findings as to the areas and/or populations involved, their locations

and their relationship in terms of distance, geography and socio-economic factors to Natick and to Philadelphia. The record is silent as to these matters.

Such silence cannot sustain the Commission's conclusions. It is elementary that (*Saginaw Broadcasting Company v. Federal Communications Commission*, 68 App. D. C. 282, 96 F.2d. 554 (1938), *cert. den. sub. nom. Gross v. Saginaw*, 305 U.S. 613 (1958)):

"... findings of fact, to be sufficient to support an order, must include . . . the basic facts from which the ultimate facts in the terms of the statutory criterion are inferred."

The absence of both basic and ultimate findings of fact totally invalidate the Commission's conclusions as to overlap. The decision below accordingly cannot stand.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Commission's determination below be set aside and that this matter be remanded to the Commission with instructions to accept Appellant's application for filing, or alternatively, to grant Appellant a hearing to determine whether the application should be accepted for filing.

Respectfully submitted,

JEROME S. BOROS

JEROME LIPPER

30 Rockefeller Plaza
New York, New York 10020

Of Counsel:

Fly, Shuebruk, Blume and Gaguine
30 Rockefeller Plaza
New York, New York 10020

Counsel for

Natick Broadcast Associates, Inc.



APPENDIX

STATUTES AND REGULATIONS INVOLVED

Administrative Procedure Act, 80 Stat. 378, 5 U.S.C. §557:

. . . All decisions including initial, recommended, or tentative decisions, are a part of the record and shall include a statement of — (A) findings and conclusions, and the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof.

Communications Act of 1934, as amended, 48 Stat. 1067, 47 U.S.C. §303:

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall —

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Rules and Regulations of the Federal Communications Commission:

47 C.F.R. §73.37 Minimum separation between stations,
prohibited overlap: —

(a) Except as indicated in other paragraphs of this section, and except for Class II-A station, no application will be accepted for a new station (or change in frequency) if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph; and no application will be accepted for a change (other than a change in frequency) of the facilities of an existing station (including the day-time facilities of an existing Class II-A station) if the proposed change would involve such overlap between the stations involved . . .

Note 3: The provisions of this section concerning prohibited overlap of signal strength contours will not apply where (1) the area of such overlap lies entirely over sea water . . .

47 C.F.R. §73.183 Groundwave Signals --

(c) . . . Figure M3 shows the conductivity throughout the United States by general areas of reasonably uniform conductivity . . . It is recognized that in areas of limited size or over a particular path, the conductivity may vary widely from the values given; therefore, these maps are to be used only when accurate and acceptable measurements have not been made.

SUPPLEMENT

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 66-1148
91804

In re Applications of)	
)	
FINE MUSIC, INC. (WFMI)	)	Docket No. 17058
Montgomery, Alabama	)	File No. BP-16502
)	
Has: 1500kc, 500w, Day, Class II)	
Requests: 1000kc, 5kw, Day, Class II)	
)	
TENNESSEE VALLEY BROADCASTING	)	Docket No. 17059
COMPANY, INC.	)	File No. BP-16609
Huntsville, Alabama)	
)	
Requests: 1000kc, 10kw, DA, Day, Class II)	
)	
ROCKET CITY BROADCASTING CO., INC.	)	Docket No. 17060
Huntsville, Alabama	)	File No. BP 16721
)	
Requests: 1000kc, 10kw, DA, Day, Class II)	
)	
For Standard Broadcast)	
Construction Permits)	

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Wadsworth absent.

1. The Commission has before it for consideration (a) the above-captioned applications; (b) an amendment to the Tennessee Valley application, tendered for filing on June 13, 1966; and (c) an "Application for Review," filed by Rocket City in response to the Commission's previous refusal to accept the Rocket City application for filing.

2. Rocket City's present request that its application be accepted for filing has been considered in the light of the following facts:

(a) The Rocket City application was originally tendered on May 10, 1965. It was returned as unacceptable on June 16, 1965, on the ground that it had been tendered too late for comparative consideration with other applications with which it was mutually exclusive because of interlinking prohibited overlap of contours. Sections 1.571(c) and 73.37 of the Commission's Rules. Specifically, the Rocket City application involved prohibited overlap with the Fine Music application, which in turn appeared to involve prohibited overlap with applications for stations at Blountstown and Quincy, Florida. The lead "cut-off" date for all these applications was that of the Quincy, Florida, application — February 15, 1965.¹ Since the Rocket City application had been tendered after that date, it was found to be untimely even though it was tendered on the published "cut-off" date of the Fine Music application.

(b) In an effort to avert that result, Rocket City included, in its original application, field intensity measurements purporting to show that there was no engineering conflict between the Florida proposals and Fine Music. Thus, Rocket City argued, the early Quincy, Florida, "cut-off" date did not bar acceptance of its application. Rocket City concluded that, since its application was tendered on or before the published "cut-off" dates of the Fine Music and Tennessee applications, it should be accepted for filing. By letter dated June 16, 1965, the Commission rejected Rocket City's application on the ground that its measurement data were not adequate to establish the absence of a conflict between the Florida and Fine Music proposals.

(c) On July 16, 1965, Rocket City retendered its application with new measurement data demonstrating that, on the date of original tender of its application, no prohibited overlap existed between the Fine Music

¹ The published cut-off dates were: (a) D. & F. Broadcasting Co. (Quincy, Fla.; File No. BP-16431), February 15, 1965; (b) Fine Music, Inc., (WFMI, Montgomery, Ala.; File No. BP-16502), May 10, 1965; (c) The Maupin Broadcasting Company (WKMK, Blountstown, Fla.; File No. BP-16600), August 17, 1965; (d) Tennessee Valley Broadcasting Company, Inc., (Huntsville, Ala.; File No. BP-16609), August 17, 1965.

and Florida proposals. With its retendered application, Rocket City submitted an "Application for Review", requesting that the Commission reconsider its previous refusal to accept the application.

(d) On June 13, 1966, Fine Music filed an amendment modifying its proposal in such a way as to eliminate any question of conflict between it and the Florida proposals.

(e) On October 28, 1966, the Florida applications were designated for hearing.

3. We do not find, on the basis of these facts, that Rocket City is entitled, as a matter of right, to acceptance and consideration of its application with the Tennessee Valley and Fine Music proposals. Notwithstanding any subsequent developments, the fact remains that, on the date of its original tender, Rocket City failed to include evidence sufficient to warrant a conclusion that there was no conflict between the Florida and Fine Music applications. For that reason, the Rocket City application was properly found to be unacceptable for filing.

4. Although Rocket City's subsequent submission (on July 16, 1965) of adequate measurement data and our separate consolidation of the Florida applications do not alter Rocket City's rights in this matter, they do argue forcefully for a waiver of the "cut-off" rule and nunc pro tunc acceptance of its application. When Rocket City first tendered its application, the best available data on file indicated that the Florida and Fine Music proposals involved an engineering conflict necessitating a hearing and that, by virtue of this conflict, the "cut-off" date of the Quincy proposal precluded acceptance of Rocket City's application. The absence of this conflict, however, is no longer subject to dispute since the Fine Music, Inc. amendment of June 13, 1966 and, therefore, we are persuaded to waive the "cut-off" rule on our own motion and to accept the application for filing.

5. As indicated above, the Commission also has before it an amendment tendered on June 13, 1966, by Tennessee Valley, changing the antenna

and transmitter location and the proposed directional radiation pattern. Examination of that amendment indicates that it does not afford adequate protection to co-channel Class I-B Station WCFL, Chicago, Illinois, in that, at an azimuth of 19 degrees true, the proposed radiation is approximately 20 mv/m in excess of that permitted by Section 73.187 of the Commission's Rules. Accordingly, Tennessee Valley's June 13, 1966, amendment will be returned as unacceptable for filing.

6. The Commission finds that the above-captioned applications are mutually exclusive because of interlinking prohibited overlap and hence must be designated for hearing in a consolidated proceeding; and that, except as indicated by the issues specified below, each of the applicants is legally, technically, financially, and otherwise qualified to construct and operate as proposed.

7. For the following reasons, an issue will be specified as to Rocket City's financial qualifications to construct and operate as proposed: The figures submitted by Rocket City indicate its proposal's initial construction and first-year operating expenses will total \$128,960.² It proposes to meet these expenses by reliance upon \$2000 of existing capital, \$8000 to be obtained through the sale of capital stock, and \$74,000 to be loaned to it by its principals. However, the balance sheets submitted by the stock subscribers and prospective lenders are in each case more than a year old, as are the credit commitment letters from the equipment manufacturer (to Rocket City) and from a local bank (to one of the prospective lenders, who proposes to rely upon it as a source of funds for his loan). Because of the absence of more current supporting documentation, a question exists as to the availability of the above-mentioned funds. Even assuming, however, that such funds are available

² I.e., (a) first-year operating expense, \$81,629; and (b) initial construction expense, \$47,332, consisting of (1) 25 percent down payment for equipment, \$11,262; (2) first year's monthly payments (10) for equipment, \$11,070; (3) building, \$15,000; and (4) miscellaneous, \$10,000.

to the extent claimed, i.e., \$84,000, some \$45,000 more will be needed to cover expenses totaling \$128,960.

8. A financial issue will also be specified, for the following reasons, as to the financial qualifications of Tennessee Valley to construct and operate as proposed: Figures submitted by Tennessee Valley indicate that applicant's initial construction and first-year operating expenses will total \$156,886.³ Tennessee Valley proposes to meet these expenses by reliance upon \$12,000 existing capital, obtained from the sale of capital stock; \$45,000 to be loaned to it by stockholders; and an open line of credit of \$66,500 from a bank. However, the balance sheets submitted by the prospective lenders are in each case more than a year old, as are the credit commitment letters to the applicant from the equipment manufacturer and the bank. Because of the absence of more current supporting documentation, a question exists as to the availability of funds. Even assuming, moreover, that such funds are available to the extent claimed, i.e. \$123,500, some \$33,383 more will be needed to cover expenses totaling \$156,886.

9. A financial qualification issue will also be specified regarding the Fine Music application. Fine Music estimates that the cost of construction of its proposal will total \$36,770, that its operating expense for the first year after the proposed WFMI modification will be \$42,000, and that its first-year revenue will be \$64,000. The figures submitted by Fine Music indicate that its initial construction expenses will total \$24,154.⁴ To meet these expenses it proposes to rely upon an \$18,000

³ I.e., (a) first-year operating expenses, \$108,000; and (b) initial construction costs, \$48,886, consisting of (1) down payment for equipment, \$13,250; (2) first-year's monthly payments (12) for equipment, \$15,636; (3) building, \$10,000; and (4) miscellaneous, \$10,000.

⁴ Consisting of (a) down payment for equipment, \$5563; (b) first year's monthly payments (10) for equipment, \$5190; (c) building, \$4000; (d) down payment for land, \$1000; (3) first year's payments for land, \$2071; (f) first year's payments on loan, \$6330.

bank loan and net operating profits. However, the applicant's balance sheet is more than two years old, as are the credit commitment letter from the equipment manufacturer and the loan commitment letter from the bank. Moreover, the October 1964 balance sheet submitted by the applicant states that, during the two years preceding the filing of its application, 1962 and 1963, it suffered net losses of, respectively, \$13,962 and \$21,326.84. Both because of the absence of more current documentation and the adverse financial data contained in the material supplied by the applicant, a question exists as to the availability to Fine Music, of the contemplated equipment credit and bank loan. Also, the applicant has failed to indicate, in any detail, the basis for its first-year revenue estimate of \$64,000. In view of that fact, the Commission is unable to appraise the reasonableness of Fine Music's revenue estimate and the extent to which revenue in excess of operating costs (net operating profits) can be relied upon to meet its initial construction expenses.

10. The site photographs submitted by Tennessee Valley and Rocket City do not adequately show the terrain in the vicinity of the proposed transmitter sites and therefore an issue will be included.

In view of the foregoing, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which would receive primary service from the Tennessee Valley and Rocket City proposals, and the availability of other primary service to such areas and populations.
2. To determine the areas and populations which may be expected to gain or lose service from the proposed operation of Station WFMI, Montgomery, Alabama, and the availability of other primary service to such areas and populations.

3. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.
4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the operations proposed in the above-captioned applications would best serve the public interest.
5. To determine, with respect to the Fine Music financial proposal:
 - a. The availability to the applicant of credit from an equipment manufacturer, and a loan from a bank, as described in the application.
 - b. The basis for the applicant's estimate of revenues in its first year of operation following the proposed modification, whether, such estimate is reasonable, and the extent to which net operating revenues may be relied upon to yield necessary funds for the initial construction cost of the proposal.
 - c. Whether, in the light of the evidence adduced pursuant to items 5-a and 5-b, Fine Music is financially qualified.
6. To determine, with respect to the Rocket City financial proposal:
 - a. The availability to the applicant of credit from an equipment manufacturer, as described in the application.
 - b. The availability to the applicant of \$8000 which it proposes to obtain from the sale of capital stock to its principals, and \$74,000 which it proposes to obtain from loans to it by its principals.

- c. Assuming that all of the funds upon which the applicant relies will be available to it, how the applicant will obtain sufficient additional funds to construct and operate the proposed station for one year.
 - d. Whether, in the light of the evidence adduced pursuant to items 6-a through 6-c, Rocket City is financially qualified.
7. To determine, with respect to the Tennessee Valley financial proposal:
- a. The availability to the applicant of credit from an equipment manufacturer, as described in the application.
 - b. The availability to the applicant of \$45,000 which it proposes to obtain from loans to it by stockholders, and \$66,500 which it proposes to obtain via bank loans.
 - c. Assuming that all of the funds upon which the applicant relies will be available to it, how the applicant will obtain sufficient additional funds to construct and operate the proposed station for one year.
 - d. Whether, in the light of the evidence adduced pursuant to items 7-a through 7-c, Tennessee Valley is financially qualified.
8. To determine whether the sites proposed by Tennessee Valley and Rocket City are satisfactory.
9. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

IT IS FURTHER ORDERED, That the above-captioned Rocket City Broadcasting Co., Inc., application IS ACCEPTED FOR FILING, nunc pro tunc, as of May 10, 1965.

IT IS FURTHER ORDERED, That the "Application for Review" submitted by Rocket City Broadcasting Co., Inc., IS GRANTED to the extent indicated above and IS DENIED in all other respects.

IT IS FURTHER ORDERED, That the amendment tendered for filing on June 13, 1966, by Tennessee Valley Broadcasting Company, Inc., IS RETURNED.

IT IS FURTHER ORDERED, That, in the event of a grant of any of the above captioned applications, the construction permit shall contain the following condition:

Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, give notice of the hearing, either individually or, if feasible and consistent with the Rules, jointly, within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Adopted: December 15, 1966

Released: December 30, 1966

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of:
MOLLY PITCHER BROADCASTING
COMPANY, INC.
Freehold, New Jersey
For Construction Permit for New
Standard Broadcast Station

)
)
)
)
)
)
)

PETITION TO REJECT APPLICATION FOR FILING

Pursuant to Sections 73.37(a) and 1.566(a) of the Commission's Rules and Regulations, John L. Kelly, Sr. and John L. Kelly, Jr., d/b/a Kel Broadcasting Company (Petitioner), by its attorney, hereby respectfully requests that the Commission reject the above captioned application, and return it to the applicant as unacceptable for filing. In support thereof, it is alleged:

1. On August 15, 1966, Petitioner filed an application for a construction permit for a new standard broadcast station to operate on 1070 kc, with a power of 0.5 kw, daytime, at Watchung, New Jersey.

2. On August 15, 1966, Molly Pitcher Broadcasting Company, Inc. (Molly Pitcher), filed an application for a construction permit for a new standard broadcast station to operate on 1070 kc, with a power of 1 kw, daytime, at Freehold, New Jersey.¹

3. Insomuch as both of the proposals are for communities approximately 30 miles apart, and insomuch as both proposals specify operation on the same frequency -- 1070 kc, a grant of both applications would result in intolerable interference with each other. Therefore, the applications are mutually exclusive because only one of them can be

¹ Both applications were filed on Standard Broadcast Station WKOK, Sunbury, Pennsylvania's cutoff date, Public Notice of which was given on July 7, 1966.

granted. Accordingly, Petitioner is a "person aggrieved or whose interests would be adversely affected" by a grant of the Molly Pitcher application, and possesses the requisite standing to petition the Commission to reject the Molly Pitcher application for filing. Sanders Bros. Radio Station v. FCC, 309 U.S. 470, 9 R.R. 2008 (1940), Clarksburg Publishing Co., v. FCC, 96 U.S. App. D.C. 211, 12 R.R. 2024 (1955).

4. As the attached Engineering Exhibit indicates, Molly Pitcher's 0.5 mv/m contour overlaps the 0.5 mv/m contour of Standard Broadcast Station WTIC, which operates on the frequency of 1080 kc, with a power of 50 kw, at Hartford, Connecticut. Such adjacent channel overlap is specifically prohibited by Section 73.37(a) of the Commission's Rules, and therefore, the public interest requires that the Commission reject said application and return it to the applicant as unacceptable for filing.

WHEREFORE, it is respectfully requested that the Commission, pursuant to Sections 73.37(a) and 1.566(a) of the Rules, reject the application of Molly Pitcher Broadcasting Company, Inc., and return it to the applicant as unacceptable for filing.

Respectfully submitted,

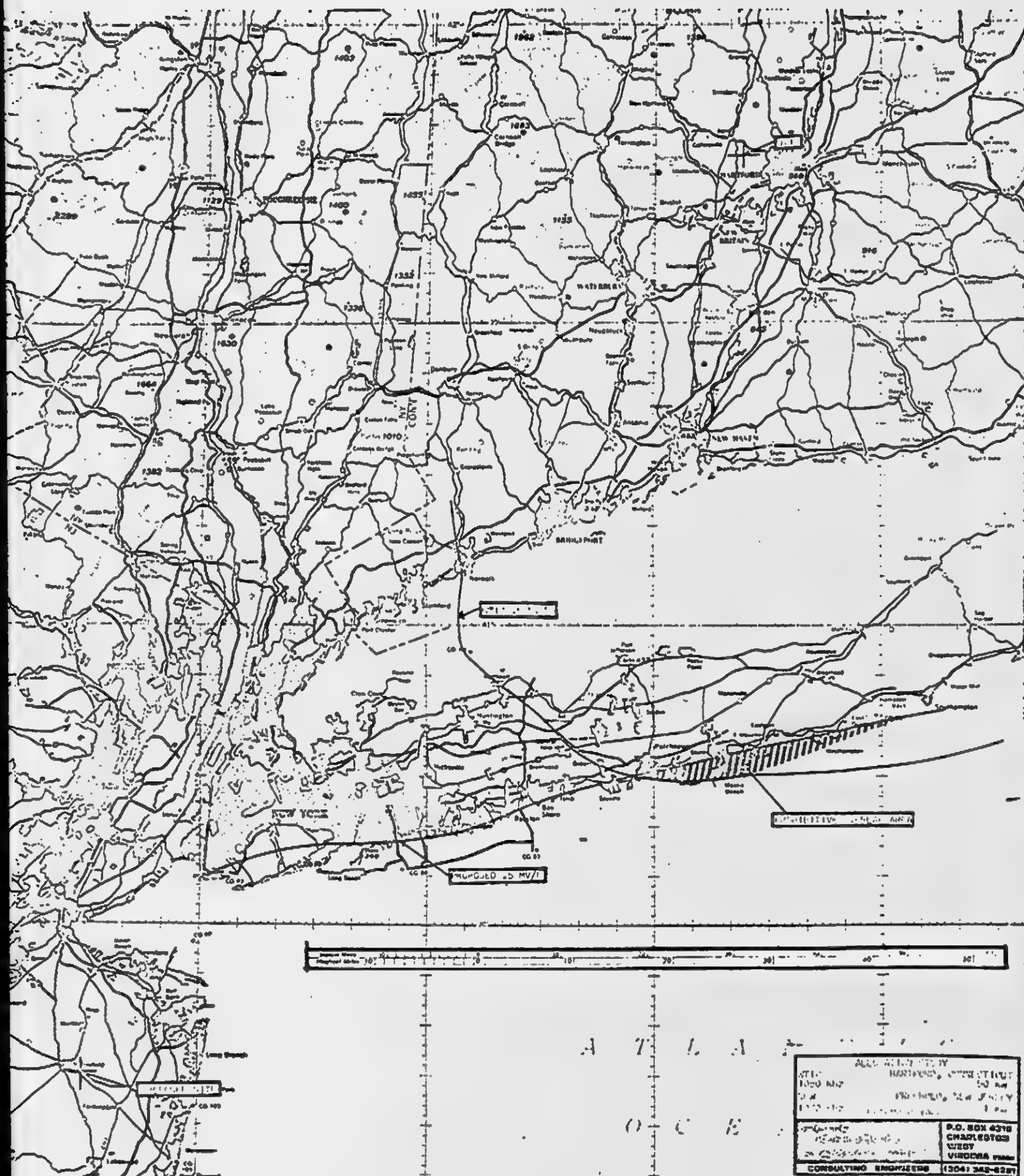
JOHN L. KELLY, SR. AND JOHN L.
KELLY, JR., d/b/a KEL BROADCASTING COMPANY

By: /s/ Gennaro D. Caliendo
Its Attorney

1334 G Street, N.W.
Washington, D.C.

October 7, 1966

[Certificate of Service]



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of:)	
)	
MOLLY PITCHER BROADCASTING)	
COMPANY, INC.	)	BP-
)	
For Construction Permit for New)	
Standard Broadcast Station)	

**OPPOSITION TO
PETITION TO REJECT APPLICATION**

Comes now Molly Pitcher Broadcasting Company, Inc. and, by its attorneys, notes the following Opposition to the "Petition to Reject Application for Filing" which was lodged against its application by Kel Broadcasting Company.

Kel Broadcasting Company alleges, correctly, that the 0.5 mv/m contour of the Molly Pitcher proposal as originally tendered would have overlapped the 0.5 mv/m contour of adjacent channel Station WTIC, Hartford, Connecticut. There is tendered herewith an Engineering Amendment that now removes all possibility of that overlap.

Although this Amendment renders moot the question raised by the Kel Broadcasting Company petition, the nature and extent of the interference to WTIC in the original proposal of this applicant is shown on Amended Fig. 10(e) of the Engineering Amendment referred to above (which Amendment is hereby incorporated herein by reference.)

From amended Figure 12 of that Amendment, it is seen that, based on measurements made in accordance with the Commission's Rules, this interference involved approximately 0.45 square miles of sand-spit on which is located a population of only 12 people. The maximum depth of the interference to WTIC is shown to have been only 0.25 miles, at the end of two radials spanning a total distance of about 140 miles (see Fig. 10 A, amended, of Engineering Amendment.) An overlap of this extent

over so great a distance is, in all probability, within the margin of error of the calculations involved and is, at most, a matter of de minimis (cf. Pinellas Broadcasting Corp., 6 RR 2d 685), so that it could not have affected this applicant's right to have its application accepted as tendered.

As indicated above, the Amendment now being submitted removes any possibility of interference to WTIC. However, for the reasons also set forth above, the application, as tendered on August 15, 1966, was equally entitled to be filed and accepted as of that date.

Respectfully submitted,

MALLYCK & BERNTON

By:

* * *

Attorneys for Molly Pitcher
Broadcasting Company, Inc.

[Certificate of Service]

FEDERAL COMMUNICATIONS COMMISSION

(SEAL)

96044

WASHINGTON, D.C. 20554

PUBLIC NOTICE - B

REPORT NO. 7980

February 10, 1967

BROADCAST APPLICATIONS ACCEPTED AND TENDERED FOR FILING

File No.	Applicant & Location	Call Letters	Nature of Application
<u>STANDARD BROADCAST APPLICATIONS ACCEPTED FOR FILING:</u>			
BAI-5982	Capitol Broadcasting Co. Sacramento, California	KGMS	Voluntary assignment of license to KULA Broadcasting Corp. (1380kc)
BAI-5983	Greater Hartford Broadcasting, Incorporated Hartford, Connecticut	WCCC	Voluntary assignment of license to Elektra Broadcasting Corporation. (1290kc)
BP-16,878 AMENDMENT	Louis E. Latham, John Osborne Bland, Jr., and Jack Lloyd Gibson d/b as Voice of The Ohio Valley, Inc. Louisville, Kentucky	(NEW)	CP for a new Standard broadcast station to be operated on: 1130 kc, 10kw DA-D, Daytime. AMENDED to change applicant's name to Voice of The Ohio Valley, Inc.
BP-17,496	Molly Pitcher Broadcasting Company, Inc. Freehold, New Jersey	(NEW)	CP for a new Standard broadcast station to be operated on: 1070kc, 1kw DA-D, Daytime. (Preliminary examination indicates this proposal is MUTUALLY EXCLUSIVE with BP-17,004)
BL-11,546	P.H. Incorporated Remsen, New York	WADR	License to cover CP (BP-13,104 as mod.) which authorized increase power; install new transmitter; specify type transmitter (RCA-5-D). (1480kc)
BL-11,545	Dick Broadcasting Company, Inc. of Tennessee Knoxville, Tennessee	WIVK	License to cover CP (BP-16,462 as mod.) which authorized change frequency; increase power; install DA-system; install new transmitter, change ant-trans location; and delete remote control. (850kc)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

B
FCC 67-607

In re Applications of)	
NEW YORK UNIVERSITY	)	Docket No. 17454
New York, New York	)	File No. BPED-742
Requests: 89.lmc, #206; 8.3kw (H);)	
7.7 kw(V); 220 ft.)	
FAIRLEIGH DICKINSON UNIVERSITY	)	Docket No. 17455
Teaneck, New Jersey	)	File No. BPED-751
Requests: 89.lmc, #206; 550w(H);)	
550w(V); 500 ft.)	
For Construction Permits)	

MEMORANDUM OPINION AND ORDER

Adopted May 17, 1967; Released May 23, 1967

By the Commission: Commissioners Bartley and Loevinger absent;
Commissioner Cox abstaining from voting.

1. The Commission has before it for consideration (a) the above captioned and described applications; (b) "Petition for Reconsideration of Staff Action and Acceptance of Application, Nunc Pro Tunc, together with Waiver of the Rules or Acceptance of Minor Corrective Amendment" filed by Fairleigh Dickinson University ("FDU"); (c) "Petition for Reconsideration" of acceptance of FDU's application filed by New York University ("NYU"); (d) FDU's "Opposition to Petition for Reconsideration"; (e) FDU's "Petition for Reconsideration" of acceptance of NYU's application; (f) NYU's "Opposition to Petition for Reconsideration"; and (g) FDU's "Reply to Opposition to Petition for Reconsideration.

2. On May 2, 1966, the Commission released its Memorandum Opinion and Order [3 FCC 2d 579, 7 RR 2d 273 (1966)] approving the agreement between NYU and the United Stations, which, subject to certain

conditions, would permit NYU to utilize Channel 206, which in the New York area is reserved by Note 1 to Section 73.501(a) of the Commission's Rules for use by the United Nations. In so doing, the Commission accepted the NYU application for filing subject to the submission of an amendment eliminating any 1 mv/m interference with other FM stations. In addition, the Commission held that the channel should be made available to other applicants on the same basis,¹ and specified that the NYU amendment and other applications would have to be received by June 16, 1966.

3. FDU's petition for reconsideration requested acceptance Nunc Pro Tunc of its application which had been tendered on June 16, 1966 and returned as unacceptable for filing on June 24, 1966 because of 1 mv/m interference which would have been received. FDU's position was that the Commission should either waive the rule barring the interference or accept its corrective amendment. By delegated authority, the re-submitted application as amended was accepted for filing on July 22, 1966. NYU then sought reconsideration of this action arguing that FDU did not tender an acceptable application before expiration of the cut-off period and that this late-filed application should not have been accepted. Simultaneously, FDU's opposed NYU's petition and filed its own petition for reconsideration attacking acceptance of the amended NYU application. Subsequent opposition and reply pleadings were filed by NYU and FDU, respectively.

4. Although the sequency of events is somewhat complex, the issues which are presented are not. Simply stated, NYU argued that the timely-filed version of FDU's application was in conflict with the Commission's rules and was not accompanied by a request for waiver as

¹ As indicated in the second further ordering clause below, if either application is granted it will be subject to conditions specified in the original agreement between NYU and the United Nations.

required by Section 1.566 of our rules. Thus, FDU's application, which was not brought into conformity with our rules until after the cut-off period ran, should not have been accepted. FDU's response contended that NYU's amended application also was defective in that it was not properly signed, and as a result it too failed to meet the cut-off date. Nevertheless FDU supported the Commission's action accepting both applications as the wisest course under the circumstances. It was FDU's point, however, that if its application must be returned, NYU's must suffer a like fate.

5. Although the pleadings also contain considerable discussion regarding the relative importance of the deficiencies in the two applications, we need not dispose of these arguments, for as both parties apparently acknowledge, we are free to waive the cut-off date and accept the applications. In both cases, the applications were not acceptable for filing when the cut-off period expired; one application violated the specific non-interference requirement specified in our rules and public notice, and the other was not properly signed. Both applications are now in proper form and we have concluded that the public interest would best be served by reaffirming our earlier acceptance of the applications to permit their prompt designation for hearing.

6. Since no determination has yet been reached on whether the antenna proposed by NYU would constitute a menace to air navigation, an issue regarding this matter is required.

7. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

8. Except as indicated below, the applicants are qualified to construct and operate as proposed. However, because of their mutual exclusivity, the Commission is unable to make the statutory finding that

a grant of the applications would serve the public interest, convenience and necessity, as of the opinion that the applications must be designated for hearing on the issues set forth below.

IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by NYU would constitute a menace to air navigation.
2. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.
3. To determine, in the event it is concluded that a choice between applications should not be based solely on considerations relating to Section 307(b), which of the proposals would better serve the public interest.
4. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to the proceeding.

IT IS FURTHER ORDERED, That in the event either application is granted it shall be subject to the following conditions:

If the United Nations desires to utilize the facilities on a part-time basis, such use, based on good faith negotiations, shall be set forth in a written agreement submitted to the Commission for prior approval. Control over program content shall remain with the University.

If the United Nations desires to operate the station, it shall give one years notice to the University which shall, subject to prior Commission approval, assign all its interest in such operation. Compensation for the equipment machinery and materials assigned shall be on the basis of cost less depreciation with disputes settled by majority vote of individually selected appraisers and an independent appraiser chosen by them.

Any dispute between the parties not resolved by negotiations shall be referred to arbitration in accordance with the rules of the American Arbitration Association then obtaining.

IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and party respondent herein, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney shall, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, give notice of the hearing, either individually or, if feasible and consistent with the Rules, jointly, within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.594 of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 67-416
97548

In re Applications of:)	
ORANGE NINE, INC.	)	Docket No. 11081
Orlando, Florida	)	File No. BPCT-1153
MID-FLORIDA TELEVISION CORPORATION	)	Docket No. 11083
Orlando, Florida	)	File No. BPCT-1801
CENTRAL NINE CORPORATION	)	Docket No. 17339
Orlando, Florida	)	File No. BPCT-3697
HOWARD A. WEISS	)	Docket No. 17340
Orlando, Florida	)	File No. BPCT-3736
FLORIDA HEARTLAND TELEVISION, INC.	)	Docket No. 17341
Orlando, Florida	)	File No. BPCT-3737
COMINT CORPORATION	)	Docket No. 17342
Orlando, Florida	)	File No. BPCT-3738
FLORIDA 9 BROADCASTING CO.	)	Docket No. 17343
Orlando, Florida	)	File No. BPCT-3739
TV 9, INC.	)	Docket No. 17344
Orlando, Florida	)	File No. BPCT-3740
For Construction Permit for New)	
Television Broadcast Station)	

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Johnson absent.

1. The Commission has before it for consideration the above-captioned applications, each requesting a construction permit for a new television broadcast station to operate on Channel 9, Orlando, Florida. The applications are mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference.

2. Ordinarily, the Commission requires applicants for a new broadcast station to show the availability of sufficient funds to construct and operate the proposed station for one year. Where an applicant relies, in whole or in part, on advertising revenues to meet its costs of operation in the first year, the Commission requires that the applicant demonstrate the validity of its estimate of revenues by a comprehensive showing.¹ In the present case, however, each of the applicants (except Mid-Florida), seeks to replace a station which has an established record of advertising revenues stretching over a prolonged period of time; the availability of revenues is beyond dispute. For this reason, we do not believe that it is necessary to require the applicants to meet the requirements of the Ultravision decision. We will, therefore, apply our former standard which required an applicant to show that it had sufficient funds to construct and operate the proposed station for three months without revenues. Under this standard, we find all of the applicants financially qualified except as follows:²

a. In connection with the application of Central Nine Corporation:

- (1). Based on information contained in the application, cash of approximately \$1,154,000 will be required for the construction and operation of the proposed station.³ To meet these requirements, the applicant relies upon existing capital of \$10,000, stock subscriptions of \$90,000, and loans totalling \$2,000,000, for a total of \$2,100,000. The applicant relies upon revenues for the remainder.

¹ Ultravision Broadcasting Co., FCC 65-581, 5 RR 2d 343.

² Salter Broadcasting Company (WBEL), FCC 67-225, released February 21, 1967, Docket Nos. 17209-17219.

³ Consisting of down payment for equipment (\$326,250), curtails and interest (\$70,959), down payment on land (\$5,800), miscellaneous expenses (\$420,000), cost of operation (\$330,623). Total: \$1,153,632.

- (2). It appears that the applicant has \$9,482 available to it in existing capital and not more than \$78,000 available in funds from financially qualified subscribers. No balance sheet or financial statement has been furnished by Mr. J. Rolfe Davis as required by Section III, Paragraph 4(d), FCC Form 301;⁴ Mr. Grover C. Bryan has not shown that he has current and liquid assets (as defined in Paragraph 4(d), Section III, FCC Form 301) in excess of current liabilities to meet his commitment to the applicant; and Mr. Clarence A. Peterson's balance sheet or financial statement does not disclose the extent of his current liabilities. The letter from Barnett First National Bank, dated November 29, 1965, upon which the applicant relies to support the availability of a loan of \$2,000,000 does not set forth the terms or conditions upon which the loan is to be made, but states that "The terms, conditions and security for such loan shall be determined at the time of borrowing and shall be acceptable to us." Moreover, the total of \$2,000,000 is to include loans to individual stockholders and, by letter dated January 7, 1966, is to include also funds which may be required in connection with the proposed interim operation of a station on Channel 9. By letter dated February 25, 1966, the bank further qualified its commitment by requiring the joint and several endorsements of all stockholders, but the stockholders have not indicated their willingness to accept such contingent liability.

⁴ Persons who will furnish funds are required to submit balance sheets or financial statements although they may show the availability of bank loans in sufficient amount to meet their commitments to the applicant. Kansas State Network, Inc., FCC 66-977, 5 FCC 2d 572.

b. In connection with the application of Florida 9 Broadcasting Co.:

- (1). Based on information contained in the application, cash of approximately \$1,718,000 will be required for the acquisition of land (\$20,000), the acquisition of equipment (\$1,073,000), miscellaneous expenses (\$300,000) and cost of operation (\$325,000). To meet these cash requirements, the applicant relies upon the availability of stock subscriptions of \$100,000 and a loan of \$2,000,000 from Citizens National Bank of Orlando, totalling \$2,100,000.
- (2). The applicant's balance sheet shows that \$11,700 has been paid in on subscriptions, but no information has been furnished as to the identity of the subscribers who have made payments on their subscriptions nor the amounts thereof. Of the 14 subscribers, only Messrs. Ferran, Nixon, Jewett, and Bryant have shown that they have current and liquid assets (as defined in Section III, Paragraph 4(d), FCC Form 301) in excess of current liabilities in sufficient amount to meet their commitments. Their commitments total \$23,000. If none of them has paid any part of his commitment, \$23,000 can be considered to be available to the applicant from subscriptions receivable, but this amount must be reduced to the extent that any of them have paid in part of their subscriptions. Thus, it appears that not more than \$34,700 may be available to the applicant from subscriptions.

- (3). The letter from Citizens National Bank of Orlando contains no terms or conditions, but the loan is to be made "... on suitable collateral, terms and conditions to be arranged at the time of the closing." It cannot be determined, therefore, that such funds will be available to the applicant or, if so, upon what terms, conditions and collateral required. Moreover, the bank's letter (dated February 25, 1966) was written before extensive changes were made by the applicant (July 6, 1966) in its stockholders and their holdings.

c. In connection with the application of TV 9, Inc.:

Based on information contained in the application, cash of approximately \$677,000 will be required for the construction and operation of the proposed station.⁵ To meet these costs, the applicant relies upon the availability of existing capital of \$15,000, stock subscriptions of \$285,000, and a loan of \$1,500,000 from Citizens National Bank of Orlando. Of the 15 subscribers who are to furnish funds, only Mr. Thompson K. Cassel has shown that he has sufficient current and liquid assets in excess of current liabilities to enable him to meet his commitment to the applicant (\$33,000); the other subscribers have furnished letters from banks to enable them to meet their commitments, but none of them has furnished a balance sheet or financial statement as required by Section III, Paragraph 4(d), FCC Form 301 (see Footnote 4, supra). The letter from Citizens National Bank contains no terms or conditions, but these are to be "... determined at the time of borrowing and shall be acceptable to us [the bank]."

⁵ Consisting of down payment for equipment (\$90,797), curtails (\$68,098), interest (\$1,475), land (\$20,000), buildings (\$28,800), other items (\$210,350), and costs of operation (\$257,538), totalling \$677,058.

3. Because of the location of the tower proposed by Orange Nine, Inc., relative to the location of various radio station towers, in the event of a grant of its application, such grant shall be subject to an AM proximity condition. Orange Nine has also requested Commission consent to the location of its proposed main studios at the proposed transmitter site outside the corporate limits of Orlando, pursuant to Section 73.613(b) of the Commission's Rules, but the applicant has not made the showing required by the rules. An issue will be specified, therefore, to determine whether good cause exists for locating the main studios outside the city limits of Orlando.

4. The transmitter proposed by Mid-Florida Television Corporation has not been type-accepted by the Commission. In the event of a grant of its application, therefore, such grant shall be subject to the condition that, prior to licensing, acceptable data shall be submitted for type-acceptance in accordance with the requirements of Section 73.640 of the Commission's Rules.

5. As originally filed, the application (BPCT-3736) of Howard A. Weiss specified the present facilities of Station WFTV, which is being operated on a temporary basis by Mid-Florida Television Corporation. On April 13, 1966, Florida Heartland Television, Inc., filed a "Petition for Dismissal of Application" requesting dismissal of the Weiss application on the grounds that he had no reason to believe that these facilities would be available to him and that the application was not, therefore, substantially complete. Florida Heartland contended that the application specifying these facilities was not filed with reasonable assurance in good faith that the facilities would be available to it⁶ and because the Commission had specified a "cut-off" date⁷ within which all applications

⁶ Citing Milam & Lansman, FCC 65R-20, 4 RR 2d 469.

⁷ By Order (FCC 65-1020, 1 FCC 2d 1377), the Commission, in WORZ, Inc., provided that new applications may be filed by March 1, 1966, and that qualified parties who had previously filed applications could bring them up to date.

for permanent authority to operate on Channel 9 in Orlando must be substantially complete and tendered for filing, the Weiss application was fatally defective. On April 29, 1966, Weiss filed his opposition thereto and simultaneously filed an amendment to his application specifying a different site.⁸ Weiss contends that the amended proposal moots the petitions requesting dismissal of his application.

6. We think that this is too important a matter to warrant dismissal of bona fide applications on technical grounds; the public interest lies in enabling us to make a choice among these applicants on the basis of merit, rather than by attrition. Charles W. Jobbins et al., FCC 64-743, 3 RR 2d 302. Moreover, since our rules provide an unlimited right to amend prior to designation for hearing, Weiss merely exercised his rights and perfected his application to the extent of eliminating this objection to it. This, too, is in the public interest. The various petitions to dismiss the Weiss application as well as the applications of Florida 9 Broadcasting Co. and TV 9, Inc., will be denied.

7. On March 14, 1966, one Harold E. Scott, purporting to be the chairman of a "Committee for Channel 9", wrote a letter to the Chairman of the Commission, with copies to all applicants, and enclosed a resolution and signature sheets containing signatures of citizens of Orlando. The letter urged the Commission to continue the stewardship of Mid-Florida in the operation of the Channel 9 station. This letter was attacked by the

⁸ In addition to the petition and opposition thereto, Florida Heartland filed a reply to the opposition on May 5, 1966. Comint Corporation filed, on May 6, 1966, a statement in support of the Florida Heartland petition and included the Florida 9 and TV 9, Inc., applications among those to be dismissed. On May 10, 1966, Mid-Florida filed a statement in support of the petition, indicating that it had no intention of making its facilities available to the other applicants in any event.

other applicants in this proceeding⁹ as being an unlawful effort, inspired, encouraged and condoned by Mid-Florida, to unilaterally influence the Commission. The charge has been categorically denied by Mid-Florida, its denial being supported by affidavits. The Commission, by its Executive Director, responded to the complaint of Central Nine Corporation, by letter to Welch and Morgan, (counsel for Central 9 Corporation), dated March 21, 1966, in which it was stated that Section 1.1223 of the Commission's Rules proscribes ex parte communications on the part of interested persons; that Mr. Scott is not an "interested person" as that term is defined in Section 1.1201(e) of the rules; and that the letter was served on all parties to the proceeding and it was not, therefore, a prohibited ex parte communication.

8. We have carefully considered the various pleadings filed in connection with this incident. There is no evidence that Mid-Florida solicited, inspired or participated in the preparation of the letter; the pleadings show that Mid-Florida exercised extreme care, upon the advice of counsel, in dealing with Mr. Scott and his proposal to write his letter. Mid-Florida does not deny its knowledge of Scott's intentions nor that Mid-Florida furnished him with the names and addresses of the other applicants and their counsel (a matter of public record) as well as the names of individual citizens who had expressed to Mid-Florida an interest in helping to retain WFTV on the air. The Scott letter was a presentation from a person not an "interested person" as that term is defined in Section 1.1201(e) of the rules and a copy of the letter was served on each

⁹ The various letters and pleadings filed in connection with this incident are: (1) letter dated March 16, 1966, from counsel for Central Nine Corporation; (2) letter dated March 21, 1966, from counsel for TV 9, Inc.; (3) response to (1) and (2) above, filed, March 29, 1966, by Mid-Florida; (4) comments, filed April 4, 1966, by Central Nine Corporation, in connection with (3) above; (5) statement, filed April 7, 1966, by TV 9, Inc., in connection with (3) above; (6) reply, filed April 13, 1966, by Mid-Florida to (4) and (5), above; (7) statement, filed April 14, 1966, by Consolidated Nine, Inc., the corporation formed by and consisting of the applicants for permanent authority for the purpose of applying for an interim operation; and (8) reply, filed April 20, 1966, by Mid-Florida, to (7) above.

of the applicants. Thus, it was not a prohibited ex parte presentation as defined by Section 1.1201(g)(1) of the rules. While Scott's activities have been questioned by some of the parties, we believe that, when viewed in proper perspective, the incident is seen as an effort by well-meaning citizens to make their views known to the Commission. The pleadings contain nothing to warrant an opposite conclusion.

9. On August 15, 1966, Custom Electronics, Inc., permittee of Television Broadcast Station WPCT, Channel 31, Melbourne, Florida, filed in this proceeding a "Petition to Deny and Statement of Interest" urging that all of the above-captioned applications, except that of Orange Nine, Inc., be denied on the grounds that grant of any of them (including the applications BPCTI-7 and BPCT-3738) of Consolidated Nine, Inc., and Comint Corporation for interim authority) would have an adverse impact on development of UHF television broadcasting in the area. The applicants filed oppositions.¹⁰ Custom alleges standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act of 1934, as amended, on the grounds that grant of any of the applications (save that of Orange Nine, Inc.) would cause petitioner economic injury because all of the applicants would compete for viewership and revenues in the same area as petitioner's station. We find that petitioner has standing. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 60 S.Ct. 693, 9 RR 2008. The petition, however, was not timely filed in accordance with the requirements of Section 1.580(i) of the Commission's Rules. Public notice of the acceptance for filing of the applications was given by the Commission on March 15, 1966. Custom alleges that its construction permit was not

¹⁰ Oppositions were filed on September 15, 1966, by Mid-Florida, Howard A. Weiss, Central Nine Corporation, Florida Heartland, Florida 9, TV 9, Inc., Comint and Consolidated Nine, Inc. Custom filed a reply on September 27, 1967.

granted until June 3, 1966, and until that time it had no standing to file a petition to deny pursuant to Section 309(d) of the Communications Act. We need not reach the question of whether Custom's petition, had it been filed within 30 days following grant of its construction permit, would have been timely filed because, in fact, Custom did not file its petition until several months later. The petition will, therefore, be dismissed, but we believe that a sufficient threshold showing has been made by the petitioner to warrant consideration as an informal objection filed pursuant to Section 1.587 of the Rules.

10. Custom alleges that, with the one exception, its predicted Grade B contour would be completely encompassed by the proposed Grade B contours of the Channel 9 applicants. The present operation of WFTV, petitioner alleges, would not overlap the UHF station's Grade B contour and there is, therefore, no objection to this operation. In view of the showing made by Custom, we believe that the question of whether a grant of any of the applications would adversely affect the ability of UHF stations in the area to complete effectively should be explored in the hearing. We believe that the most efficient way to accomplish this would be to specify a single issue applicable to all applicants. The burden of proof and the burden of proceeding with the introduction of evidence on the issue will be placed upon Custom.

11. Except as indicated by the issues specified below, the Commission finds that the applicants are qualified to construct, own and operate the proposed television broadcast station. The applications are, however, mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference. The Commission is, therefore, unable to make the statutory finding that grant of the applications would serve the public interest, convenience and necessity and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below.

Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

1. In connection with the application of Orange Nine, Inc., to determine:

Whether good cause exists for location of the main studios outside the corporate limits of Orlando, Florida, as proposed, and, if so, whether such location would be consistent with operation of the station in the public interest.

2. In connection with the application of Central Nine Corporation, to determine:

(a) Whether J. Rolfe Davis, Grover C. Bryan, and Clarence A. Peterson have current and liquid assets (as defined in Section III, Paragraph 4(d), FCC Form 301) in excess of current liabilities in sufficient amount to meet their commitments to the applicant.

(b) The terms, conditions, and security required, if any, in connection with the proposed loan from Barnett First National Bank; whether the applicant and its principals can meet such terms and conditions; the extent to which funds from such loan will be available to the applicant as distinguished from the individual stockholders; and whether, in view of the evidence adduced, such loan will be available.

(c) Whether, in the light of the evidence adduced pursuant to the foregoing, the applicant is financially qualified.

3. In connection with the application of Florida 9 Broadcasting Co., to determine:

(a) The identity of the subscribers who have paid in funds against their subscriptions and the amounts thereof and in the light of such information, the total amount receivable from the subscriptions of Harry H. Ferran, Joseph J. Nixon, Eugene L. Jewett and John J. Bryant.

(b) Whether the subscribers not enumerated in (a) above, have current and liquid assets (as defined in Section III, Paragraph 4(d), FCC Form 301) in excess of current liabilities in sufficient amount to meet their commitments to the applicant.

(c) Whether the proposed loan from Citizens National Bank of Orlando will be available to the applicant, and, if so, the terms, conditions, and collateral required in connection therewith.

(d) Whether, in the light of the evidence adduced pursuant to the foregoing, the applicant is financially qualified.

4. In connection with the application of TV 9, Inc., to determine:

(a) With the exception of Thompson K. Cassel, the current liabilities of each of the subscribers and the extent to which funds in excess thereof will be available to them to meet their commitments to the applicant.

(b) Whether the proposed loan from Citizens National Bank of Orlando will be available to the applicant and, if so, the terms, conditions, and collateral required in connection therewith.

(c) Whether, in the light of the evidence adduced pursuant to the foregoing, the applicant is financially qualified.

5. To determine whether a grant of any of the applications would impair the ability of authorized and prospective UHF television broadcast stations in the area to compete effectively.
6. To determine which of the proposals would best serve the public interest.
7. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

IT IS FURTHER ORDERED, That the Petition to Deny and Statement of Interest filed herein by Custom Electronics, Inc., IS DISMISSED, as untimely filed, but considered as an informal objection filed pursuant to Section 1.587 of the Commission's Rules, IS GRANTED to the extent indicated herein.

IT IS FURTHER ORDERED, That, upon the Commission's own motion Custom Electronics, Inc., IS MADE A PARTY RESPONDENT in this proceeding with respect to Issue 5 only.

IT IS FURTHER ORDERED, That the burden of proof and the burden of proceeding with the introduction of evidence with respect to Issue 5 IS PLACED upon Custom Electronics, Inc.

IT IS FURTHER ORDERED, That the petitions filed herein requesting dismissal of the applications of Howard A. Weiss, Florida 9 Broadcasting Co., and TV 9, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the requests filed herein by Consolidated Nine, Inc., Central Nine Corporation, and TV 9, Inc., to the extent that they request special issues in connection with the letter of Harold E. Scott, ARE DENIED.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of Orange Nine, Inc., such grant shall be made subject to the following condition:

"That a skeleton proof shall be submitted on each station to prove that the directional patterns of Station WKIS, WDBO, and WLOF have not been changed. Proofs shall consist of at least five field intensity measurements on each radial measured in connection with the original proofs of Station WKIS, WDBO, and WLOF. Data shall include a tabulation of all pertinent meter indications and the measured fields at the monitor locations."

IT IS FURTHER ORDERED, That, in the event of a grant of the application of Mid-Florida Television Corporation, such grant shall be subject to the following condition:

"That, prior to licensing, the permittee shall submit acceptable data for type-acceptance of its transmitter in accordance with the requirements of Section 73.640 of the Commission's Rules."

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and the party respondent herein, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Adopted: March 29, 1967

Released: April 7, 1967

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM MEMORANDUM OPINIONS AND
ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
Counsel,

STUART F. FELDSTEIN,
Counsel.

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 4 1967

Nathan J. Paulson
CLERK

Federal Communications Commission
Washington, D. C. 20554

STATEMENT OF QUESTIONS PRESENTED

The statement of questions presented as approved by this Court has been set forth on the first page of appellant's brief.

TABLE OF AUTHORITIES

Cases:

	<u>Page</u>
<u>American Airlines, Inc. v. C.A.B.</u> , 123 U.S. App. D.C. 310, 359 F.2d 624, <u>cert. denied</u> 385 U.S. 843 (1966).	25
<u>Central Broadcasting Co. v. Federal Communications Commission</u> , C.A.D.C., Cases Nos. 20088 and 20306, decided December 20, 1966. 377 F.2d 142	12
<u>*Ranger v. Federal Communications Commission</u> , 111 U.S. App. D.C. 44, 294 F.2d 240 (1961).	2,5,19,26

Administrative Decisions:

<u>Coastal Broadcasters, Inc.</u> , 37 F.C.C. 1002 (1964).	25
<u>Fine Music, Inc.</u> , 6 F.C.C. 2d 186 (1966).	14
<u>Johnston Broadcasting Co.</u> , 5 Pike & Fischer, RR 1320 (1950).	13
<u>*Kittyhawk Broadcasting Corp.</u> , 7 F.C.C. 2d 153 (1967).	26
<u>Mansfield Broadcasting Co.</u> , 4 F.C.C. 2d 154 (1966).	24
<u>Newcastle Broadcasting Corp.</u> , 1 F.C.C. 2d 1124 (1965).	25
<u>New York University</u> , FCC 67-607, released May 23, 1967.	16
<u>Virginia Broadcasters</u> , FCC 67-850, adopted July 19, 1967.	17

Rules and Regulations of the Federal Communications Commission, 47 CFR:

Section 1.227(b) (1) and (4)	2,8
Section 1.564(a)	7
Section 1.566(a)	8,9
Section 1.571(c)	2,8
Section 1.580(c)	9
Section 1.591(b)	2
<u>*Section 73.37(a)</u>	3,7,9,12,20,23,24
Section 73.152	10
Section 73.182(s)	10
Section 73.183(a) and (c)	10
Section 73.187	17

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF QUESTIONS PRESENTED	(i)
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	
I. APPELLANT HAD AMPLE NOTICE THAT AN ACCEPTABLE APPLICATION HAD TO BE TENDERED BY THE STATED CUT-OFF DATE. IT CLEARLY FAILED TO MAKE SUCH AN ACCEPTABLE FILING, AND ITS LATER, NEW SUBMISSION WAS NOT ACCOMPANIED BY SUFFICIENT REASONS TO WARRANT <u>NUNC PRO TUNC</u> TREATMENT.	7
A. Application Processing Procedure.	7
B. The Nature Of The Defect In Appellant's Application.	9
C. The Commission Was Correct In Refusing To Afford <u>Nunc Pro Tunc</u> Treatment To Appellant's Retendered Application.	13
II. THE OVERLAP RULE IS A REASONABLE EXERCISE OF THE COMMISSION'S RULE MAKING AND LICENSING POWERS; NO BASIS FOR A HEARING EXISTED ON THE PRESENCE OF OVERLAP IN APPELLANT'S APPLICATION.	20
A. Reason For The Overlap Rule.	20
B. A Hearing Was Not Required.	22
CONCLUSION	26
APPENDIX A	
APPENDIX B	

TABLE OF AUTHORITIES

Cases:

	<u>Page</u>
<u>American Airlines, Inc. v. C.A.B.</u> , 123 U.S. App. D.C. 310, 359 F.2d 624, <u>cert. denied</u> 385 U.S. 843 (1966).	25
<u>Central Broadcasting Co. v. Federal Communications Commission</u> , C.A.D.C., Cases Nos. 20088 and 20306, decided December 20, 1966. 377 F.2d 142	12
<u>*Ranger v. Federal Communications Commission</u> , 111 U.S. App. D.C. 44, 294 F.2d 240 (1961).	2,5,19,26

Administrative Decisions:

<u>Coastal Broadcasters, Inc.</u> , 37 F.C.C. 1002 (1964).	25
<u>Fine Music, Inc.</u> , 6 F.C.C. 2d 186 (1966).	14
<u>Johnston Broadcasting Co.</u> , 5 Pike & Fischer, RR 1320 (1950).	13
<u>*Kittyhawk Broadcasting Corp.</u> , 7 F.C.C. 2d 153 (1967).	26
<u>Mansfield Broadcasting Co.</u> , 4 F.C.C. 2d 154 (1966).	24
<u>Newcastle Broadcasting Corp.</u> , 1 F.C.C. 2d 1124 (1965).	25
<u>New York University</u> , FCC 67-607, released May 23, 1967.	16
<u>Virginia Broadcasters</u> , FCC 67-850, adopted July 19, 1967.	17

Rules and Regulations of the Federal Communications Commission, 47 CFR:

Section 1.227(b) (1) and (4)	2,8
Section 1.564(a)	7
Section 1.566(a)	8,9
Section 1.571(c)	2,8
Section 1.580(c)	9
Section 1.591(b)	2
<u>*Section 73.37(a)</u>	3,7,9,12,20,23,24
Section 73.152	10
Section 73.182(s)	10
Section 73.183(a) and (c)	10
Section 73.187	17

Other Authorities:

Page

Report and Order in Docket No. 15084, 29 F.R. 9492,
2 Pike & Fischer, RR 2d 1658 (1964).

20

*Report and Order In The Matter Of The Processing Of
Standard Broadcast Applications, FCC 59-315, 18
Pike & Fischer, RR 1565 (1959).

18

Standards of Good Engineering Practice Concerning
Standard Broadcast Stations, 4 F.R. 2862 (1939).

10

* Cases and other authorities chiefly relied upon are
marked with an asterisk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM MEMORANDUM OPINIONS AND
ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This appeal, filed pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), arises from (1) an action of the Federal Communications Commission, dated July 2, 1965, returning as unacceptable for filing the application of Natick Broadcast Associates, Inc., for a permit to construct a new standard broadcast station at Natick, Massachusetts to operate daytime only on 1060 kilocycles with one kilowatt of power; (2) a Memorandum Opinion and Order of the Commission released February 14, 1966, denying reconsideration of the above action; and (3) a Memorandum Opinion and Order released February 8, 1967, denying Natick's Petition for Relief.

Because appellant's Statement of the Case is argumentative, it is felt that the following counterstatement will be of assistance to the Court.

On November 30, 1964, the Commission accepted for filing the application of Home Service Broadcasting Corporation for a permit to construct a new standard broadcast station on 1060 kilocycles at Natick, Massachusetts. Pursuant to Sections 1.227(b)(1) and (4), 1.571(c), and 1.591(b) of the Commission's Rules,^{1/} the Commission released a Public Notice on April 2, 1965 (FCC 65-267), setting May 10, 1965, as the cut-off date by which any application in competition with the Home Service application had to be filed if it was to receive comparative consideration with the Home Service application.^{2/} Appellant tendered its application on the last possible day, May 10, 1965.

By letter of July 2, 1965, the Commission returned appellant's application as unacceptable for filing (J.A. 29).^{3/} Appellant had relied on Figure M-3 data to compute the groundwave contours of its proposal.^{4/} Its showing did not reflect the existence

^{1/} The text of these rules is set out in Appendix A attached hereto.

^{2/} The establishment of a cut-off date is part of the Commission's procedure to insure prompt handling and disposition of all applications. See Ranger v. Federal Communications Commission, 111 U.S. App. D.C. 44, 294 F.2d 240 (1961).

^{3/} No application in conflict with Home Service having been accepted for filing by the cut-off date, the Home Service application was thus ready for processing. It was granted by the Commission on July 5, 1967, subject to the outcome of this appeal (Report No. 6546, Public Notice of July 6, 1967).

^{4/} Figure M-3 is the Commission's soil conductivity map which provides a method whereby contours can be predicted and plotted without actual field measurements being taken.

of any prohibited overlap. Nonetheless, the Commission's preliminary review of the application uncovered an erroneous computation of the proposed 0.005 mv/m contour. Properly used, Figure M-3 showed that appellant's proposed 0.005 mv/m contour would overlap the 0.1 mv/m contour of co-channel station KYW, Philadelphia, Pennsylvania. Section 73.37(a) of the Commission's Rules provides that an application for a new station will not be accepted where such overlap exists. It was for this reason that appellant's application was rejected.

Thereafter, on August 2, 1965, appellant retendered its application along with a Petition For Reconsideration of the Commission's earlier action and an engineering exhibit consisting of field measurement data demonstrating that the above-mentioned overlap would not occur (J.A. 31-64). Appellant requested that its application be accepted for filing as of May 10, 1965, in order that it might be considered comparatively with the Home Service application. In a Memorandum Opinion and Order released February 14, 1966 (J.A. 71-73), the Commission denied appellant's request for reconsideration on the ground that the application as tendered on May 10, 1965, was clearly not acceptable under the Commission's Rules and no sufficient reasons had been advanced to justify nunc pro tunc treatment.

Appellant then, on March 16, 1966, filed a Petition For Relief (J.A. 74-98) which was essentially yet another request

for reconsideration, reiterating appellant's arguments for accepting its application nunc pro tunc as of May 10, 1965. In a Memorandum Opinion and Order released February 8, 1967 (J.A. 115-123), the Commission once more rejected appellant's contentions.

On March 16, 1966, appellant had filed an appeal in this Court from the July 2, 1965, and February 14, 1966 Commission actions (Case No. 20053). This appeal was dismissed at appellant's request on March 27, 1967. The instant appeal from all three Commission Orders was filed on March 10, 1967.

SUMMARY OF ARGUMENT

The Commission correctly returned appellant's originally tendered application as unacceptable for filing because of a clear violation of its prohibited overlap rule. Appellant's subsequent late attempt to show that this overlap did not exist was an entirely new showing utilizing a method of measurement which could have been employed initially. No sufficient reasons were advanced to warrant treating appellant's retendered application as filed nunc pro tunc. The Commission's action was entirely consistent with its past and present practice. Under the Commission's cut-off rule, an applicant must have an acceptable application on file by a certain published date in order to receive comparative consideration with all previously filed conflicting applications. This is a reasonable requirement which appellant failed to meet. Ranger v. Federal Communications Commission, 111 U.S. App. D.C. 44, 294 F.2d 240 (1961).

The overlap rule, Section 73.37(a), is a reasonable exercise of the Commission's rule making and licensing powers. Under the terms of this rule, an application which shows prohibited overlap on its face is thereby rendered defective and merits no further consideration. This rule is similar to the mileage separation limits in FM and television, and is intended to implement the basic allocation scheme. It was adopted because the previous ad hoc approach was not achieving the desired allocation results. Appellant's application clearly violated this rule and no request

for waiver was made. Thus, there was no basis for a hearing on the existence of the overlap. Appellant's later submission did not reinforce its original showing, rather it was a new showing which was correctly rejected as being late.

Although the Commission has a statutory obligation to choose between competing applications, it must also maintain a basic allocation scheme. These two goals are not conflicting but rather mesh.

ARGUMENT

- I. APPELLANT HAD AMPLE NOTICE THAT AN ACCEPTABLE APPLICATION HAD TO BE TENDERED BY THE STATED CUT-OFF DATE. IT CLEARLY FAILED TO MAKE SUCH AN ACCEPTABLE FILING, AND ITS LATER, NEW SUBMISSION WAS NOT ACCOMPANIED BY SUFFICIENT REASONS TO WARRANT NUNC PRO TUNC TREATMENT.

Appellant asserts that the Commission erred in summarily rejecting its "substantively conforming application" and, later, in refusing to permit it to cure the defect which required its dismissal. Contrary to appellant's contention, its application as originally tendered was not "substantively conforming"; rather, overlap in contravention of Section 73.37(a) was apparent on its face. Appellant's subsequent late attempt to show that this overlap did not in fact exist utilized a method of measurement which could have been employed initially. Furthermore, no sufficient reasons were advanced which would warrant treating appellant's application as filed nunc pro tunc.

A. Application Processing Procedure

As a preliminary matter, it is important to understand the Commission's application processing procedure as it relates to this case. Section 1.564(a) of the Commission's Rules requires that applications which are tendered for filing be dated upon receipt and then examined to ascertain whether they are complete. If they are at least substantially complete, they are accepted for filing. Minor defects as to completeness may be corrected

thereafter. However, Section 1.566(a) provides, in pertinent part, that:

Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing

When an application is accepted for filing, it is given a file number. At regular intervals, a Public Notice is issued listing those applications which have been accepted. Pursuant to the processing procedure described in Sections 1.227(b)(1) and 1.571(c), applications are considered in numerical order according to their file numbers except that those which are mutually exclusive are considered together. To facilitate the consideration of all such conflicting applications with reasonable dispatch, the Commission periodically publishes in the Federal Register a Public Notice listing those applications near the top of its processing line. This Public Notice establishes a date (at least 30 days after publication) by which time any mutually exclusive applications must be filed in order to be eligible for comparative consideration.

Translating this procedure to the facts here, Home Service tendered its application on September 23, 1964. The application was subsequently amended and thereafter accepted for filing on November 30, 1964. Public Notice of this filing was released on

March 2, 1965.^{5/} Subsequently, in a Public Notice released April 2, 1965, the Commission designated May 10, 1965, as the last (cut-off) date by which applications in competition with Home Service might be filed. Appellant tendered its application on the May 10 cut-off date. The Commission's preliminary review revealed that the predicted 0.005 mv/m contour of the proposed station would overlap the 0.1 mv/m contour of Station KYW, Philadelphia, Pennsylvania, in direct contravention of Section 73.37(a) of its Rules, which provides that "no application will be accepted for a new station" if the proposed operation would involve such prohibited overlap. Therefore, pursuant to this rule and to Section 1.566(a), supra, appellant's application was returned as unacceptable for filing.

B. The Nature Of The Defect In Appellant's Application.

Section V-A of FCC Form 301 (broadcast application) and the Commission's Rules require an applicant to submit certain engineering data in order to illustrate that its proposal will meet the Commission's technical requirements. Among these data are the various proposed groundwave contours, each contour describing the outer perimeter of a certain signal strength. The Commission's Rules permit alternative methods for plotting groundwave contours. The preferred procedure entails actual field intensity measurements.

^{5/} In addition, as required by the Commission's Rules (Section 1.580(c)), Home Service published notice in the local Natick newspaper that it had tendered its application.

Additionally, contours may be predicted on a theoretical basis by use of the data reflected on Figure M-3, the Commission's soil conductivity map. The Commission, however, has long recognized and informed applicants that the use of actual field intensity measurements is the more accurate method for plotting contours. For example, Section 73.152 of the Commission's Rules provides as follows:

In the determination of interference,
groundwave field intensity measurements
will take precedence over theoretical
values. . .

See also Sections 73.182(s) and 73.183(a) to the same effect. In addition to the expressed preference in the Rules for actual measurements, the Commission has from time to time warned parties that the soil conductivity map is not precise. For example, in its 1939 Standards of Good Engineering Practice Concerning Standard Broadcast Stations, the Commission stated in reference to Figure M-3 that "[i]n areas of limited size or over a particular path, the conductivity may vary widely from the values given." 4 Fed. Reg. 2862, 2868. This cautionary statement has been issued with every revision of the map and is contained in Section 73.183(c) of the Rules.

Notwithstanding the foregoing, appellant elected to rely on the theoretical values of Figure M-3 in plotting its proposed groundwave contours and, based thereon, averred in its

originally tendered application that there would be no prohibited overlap with Station KYW (then WRCV) (J.A. 10, 18, 20). However, the Commission's preliminary review of the application revealed that appellant had erroneously computed the location of the proposed station's 0.005 mv/m contour and that a correct placement of that contour resulted in prohibited overlap with KYW's 0.1 mv/m contour (J.A. 29).

After its application was returned, appellant made the field intensity measurements which it could have, but chose not to make in the first instance.^{6/} Appellant then requested reconsideration of the Commission's rejection of its application basing its request solely on the results of these measurements which indicated that no prohibited overlap would occur (J.A. 31-32). Appellant also urged that the retender be considered nunc pro tunc, i.e. as of May 10, 1965.

Clearly, the Commission's rejection of this request was proper since appellant was simply trying at a late date to correct its application via the actual measurement method, one which the Commission has found preferable and which appellant could have used in the first place. No reasons were given as to why

^{6/} These measurements appear to have been made by Edward F. Perry, President of the applicant and an experienced radio and consulting engineer (J.A. 79, 100, 166-167). Also well schooled in broadcast engineering is Roland J. Boucher, the applicant's Vice President (J.A. 100, 167).

the preferred method was not used initially, nor were any reasons advanced for nunc pro tunc acceptance except that appellant desired comparative consideration with Home Service. Appellant cannot expect to be able to correct and alter its application in direct contravention of the Commission's processing rules without good reason. See Central Broadcasting Co. v. Federal Communications Commission, C.A.D.C. Case Nos. 20088 and 20306, decided December 20, 1966.

Appellant asserts in both its Petition For Relief and in its Brief herein that its application as originally tendered showed only "apparent overlap" to a "de minimis" degree and that its subsequent measurements cured this defect. Appellant at the same time takes the inconsistent position that its original application actually never violated the overlap rules, as shown by the subsequently taken measurements. The fact of the matter is that the original application clearly revealed overlap of a prohibited nature. Appellant may choose to call it de minimis but Section 73.37(a) does not deal in gradations of overlap. It is an absolute rule, and under that rule appellant's application was simply not acceptable for filing as submitted on May 10, 1965. Appellant's subsequent retendering did not reinforce its original showing; rather, it made an entirely new showing in

no way curing the fact that the application as originally submitted proposed prohibited overlap and was therefore unacceptable.

C. The Commission Was Correct In Refusing To Afford Nunc Pro Tunc Treatment To Appellant's Retendered Application.

The real question here is whether the Commission was correct in refusing to afford nunc pro tunc treatment to appellant's retendered application. We submit that no abuse of discretion or ignoring of precedent has been shown. On the contrary, the Commission's decision is consistent with its past actions and with the processing rules which are vital to the orderly dispatch of its business.

The agency cases cited by appellant are not helpful to its position here. For example, in Johnston Broadcasting Co., 5 Pike & Fischer, RR 1320 (1950), the Commission permitted a nunc pro tunc amendment of an application in order to correct a defective verification. The Commission explained, 5 Pike & Fischer, RR at 1324:

. . . The proposed amendment . . . would appear to be clearly corrective in nature, since the substance of the engineering report, which the defective verification failed to cover, has never been in issue and the amendment at this time would create no factual issue for further determination by the Commission. There is no contention that Beach [the applicant] has not acted in good faith at all times, nor has it been alleged that the engineering report in question was false or erroneous in any respect. (Emphasis added.)

The difference between the above situation and the case at bar is obvious. In the words of appellant, "[n]ot technical mishap but substantive merit is the proper touchstone for decisions under the Communications Act." (Br. 14). The application in Johnston was substantially complete when accepted for filing, there being only a defect in form, whereas appellant's application contained a defect of substance which rendered it unacceptable for filing.

Fine Music, Inc., 6 F.C.C. 2d 186 (1966) (reprinted in the supplement to appellant's brief), is totally inapplicable for two reasons. First, as appellant states, A, whose application was in conflict with B, tendered its application on B's cut-off date. But B's proposal conflicted with C, as a result of which A would normally be governed by C's cut-off date which was earlier than B's and which would have resulted in A's application being late filed. A endeavored unsuccessfully by means of field intensity measurements to show that there was actually no engineering conflict between B and C. The Commission, however, did not accept A's showing and returned A's application as untimely filed. A later retendered its application with acceptable measurement data and the Commission accepted A's application nunc pro tunc as of B's cut-off date. The difference between Fine Music and this case is that A never changed its application. A was merely trying to show

that the wrong cut-off date had been applied to it. This is far different than submitting a late, substitute showing in order to eliminate a substantive defect in an application. The second, and equally vital difference between these two cases is that the Commission's nunc pro tunc acceptance of A's application was based not only upon the above facts but also on the fact that B had amended its application to remove any possibility of a conflict between B and C. In fact, a reading of the dispositive paragraph of the Commission's opinion (paragraph 4, S-3) leads to the conclusion that B's amendment really decided the issue of A's nunc pro tunc acceptance.

The acceptance of the application of Molly Pitcher Broadcasting Company, Inc. referred to by appellant (Br. 16, S-10 to S-15), is also easily explainable. It is true that Molly Pitcher's application originally involved overlap with an existing station. It is also true that Molly Pitcher amended its application to eliminate that overlap prior to acceptance of its application. However, the change in the application was not made after the expiration of any applicable cut-off date as is the case here. It will be noted that the "Petition To Reject Application For Filing" refers to Molly Pitcher and a second application being tendered on the cut-off date of a third application (footnote 1, S-10). However, Molly Pitcher was in conflict with

only the second application, and it had not been accepted for filing when Molly Pitcher submitted the above-referenced amendment which also removed this conflict.

Finally, New York University, FCC 67-607, released May 23, 1967 (S-16), is totally inapposite. That case involved FM applications concerning which there are no cut-off rules. FM allocation, just as in the case of television allocation, is achieved via assigned channels. The channel involved in New York University had been reserved for use by the United Nations. It was inactive when New York University applied for it pursuant to an agreement with the United Nations. The NYU application was accepted subject to the submission of an amendment eliminating interference with other FM stations. The Commission held, however, that the channel should be made available to other applicants and specified that the NYU amendment and any other applications would have to be received by a specified date. Thus an ad hoc cut-off date was established. NYU failed to amend in time and a second application which was timely tendered was also faulty. Both applicants submitted corrective amendments after the so-called cut-off date. The Commission, faced with having no applicants for the channel, decided instead to accept both applications.

We have gone into some detail above in order to demonstrate that appellant has cited no cases which are in any way inconsistent with the one at bar. Moreover, contrary to appellant's

allegation, the instant case does not stand alone. It is entirely consistent with past Commission practice under the "cut-off" procedure.^{7/} In fact, the Commission very recently decided a case virtually on all fours with the one at bar, Virginia Broadcasters, FCC 67-850, adopted July 19, 1967. There, the applicant tendered its application four days before the announced cut-off date. The application was returned as unacceptable for filing, however, because of excessive daytime skywave radiation, a violation of Section 73.187 of the Rules. After the cut-off date, the applicant requested reconsideration and acceptance nunc pro tunc. The applicant also submitted an amendment correcting the original defect and stated that it should not be held responsible for the error of its consulting engineer. The Commission affirmed its original decision holding that if the applicant had not decided to delay its filing until shortly before the cut-off date, perhaps the defect could have been remedied in time. "But, the plight of which it complains is of its own making; and public interest considerations can hardly be said to weigh in favor of the procedural disarray that would result from its acceptance."

^{7/} For example, see the Commission letter of June 8, 1965, to Heart of the Lakes Broadcasting Co. (Appendix B). Heart of the Lakes tendered its application on the applicable cut-off date, but the application was incomplete. It tendered the remaining material the next day but the Commission returned the application.

The cut-off rule was adopted in 1959 as a response to a mounting backlog of standard broadcast applications.^{8/} Under the rules prior to 1959, an application was entitled to consideration with a prior filed application if it was on file by the close of business on the day before the prior filed application was granted or designated for hearing. Also, as is still the case, applications could be freely amended as a matter of right at any time before designation for hearing. This led to a logjam of applications since each time an application was processed and ready for action, new applications would be filed or amendments submitted and the whole process had to begin anew. The Commission set forth some convincing statistics along this line and then stated, 18 Pike & Fischer, RR at 1566:

The situation outlined above has seriously impaired the handling of applications for new or changed standard broadcast facilities, and has been very wasteful of the time of the Commission's staff. It is now clear that there can be no improvement in the status of the processing line unless applications may be processed to a conclusion without interruption and the necessity of reprocessing because of new filings and amendments to pending applications, including those in the processing stage.

In this context, the cut-off rule was promulgated. Under this rule an applicant is expected to submit an acceptable application on or before any cut-off date which applies to him. If he does not meet this requirement, he is not entitled to consideration

^{8/} Report and Order, FCC 59-315, 18 Pike & Fischer, RR 1565.

with the already-accepted conflicting application. The theory is that applicants and potential applicants should have every opportunity to perfect their proposals consonant with the orderly and timely disposition of the Commission's business.

This procedure was fully endorsed by this Court in Ranger v. F.C.C., 111 U.S. App. D.C. 44, 294 F.2d 240 (1961). In that case, the applicant had failed to submit an acceptable application by the applicable cut-off date, and a later request for nunc pro tunc treatment had been denied. This Court affirmed, stating, 111 U.S. App. D.C. at 48, 294 F.2d at 244:

Appellants were on notice when they filed their application that the cut-off date for comparative consideration with a pending application was May 15th. Thus they were on notice that an application by them must be in such condition by that date as to entitle them to comparative hearing. When they failed to comply with the clear and valid rule they assumed the risks of that failure.

It is submitted that appellant is in no different position.

II. THE OVERLAP RULE IS A REASONABLE EXERCISE OF
THE COMMISSION'S RULE MAKING AND LICENSING
POWERS; NO BASIS FOR A HEARING EXISTED ON THE
PRESENCE OF OVERLAP IN APPELLANT'S APPLICATION.

Appellant devotes several pages of its brief to various arguments attacking the Commission's application of its overlap rule, Section 73.37 (Br. 17-21). Short of instructing the Commission to accept appellant's application, appellant asserts that this Court should require the Commission to afford it a hearing as to whether its application, as originally tendered, violated the overlap rule and, if so, whether a waiver was warranted. Appellant apparently considers its allegations below that there is no or only de minimis overlap to be sufficient reason for a hearing. Appellant also argues that the Commission's refusal to waive the overlap rule overrode its statutory obligation to choose between qualified applicants and that no reasons were given for its choice between these conflicting policies. Finally, appellant asserts that the Commission's conclusion concerning the existence of prohibited overlap was unsupported by findings of fact regarding the location, size and other characteristics of the overlap area.

A. The Reason For The Overlap Rule

The system of prohibited overlap embodied in Section 73.37 was adopted in the Report and Order in Docket No. 15084, released July 7, 1964, 29 F.R. 9492, 2 Pike & Fischer, RR 2d 1658. The Commission had become concerned with the long term results of

the ad hoc methods used for standard broadcast (AM) station assignments and had imposed a "freeze" in 1962 on new AM applications so that it might study the situation. In the words of the Commission, "as more and more assignments have been made, increased reliance has been placed upon very detailed calculations and evaluations of 'service' and 'interference' in individual cases to a degree unwarranted with the methods available." 2 Pike & Fischer, RR 2d at 1663. And again, "Insofar as concentration on the facts of each individual case must inevitably distort our sense of perspective in viewing the AM allocation picture as a whole, the ad hoc process may, (except in very extraordinary cases), work at cross-purposes to our basic station assignment goals." 2 Pike & Fischer, RR 2d at 1666.

After considerable study the Commission lifted its "freeze" and adopted the prohibited overlap procedure as being the best plan proffered. The Commission explained the theory as follows, 2 Pike & Fischer, RR 2d at 1667:

In this proceeding, we have proposed to bar overlap of defined signal strength contours between existing stations and new proposals. In effect, the proposed system is similar to the mileage separation rules currently employed in FM and in television. In FM and in television, the rules provide specific minimum separations between stations of specified types in specified regions of the country. These separations are based upon a certain average level of protection for each station when all stations are assumed to operate with maximum facilities. Although the rules proposed for AM do not assume operation with maximum facilities, and do not provide fixed separations between all stations of a particular

class, they are similar to the FM and television rules. The prohibited overlap rules suggested for AM propose, in essence, the following: Two AM stations on the same channel or on adjacent channels must be separated by a certain required distance.

Thus, under the new system, an application either conforms with the rule on the engineering facts or it does not. If it does not, it will not be accepted because it is an invalid proposal. This decision is based on the engineering showing contained in the application.

On the propriety of this procedure, the Commission stated, 2 Pike & Fischer, RR 2d at 1667:

We do not purport to say that the overlap or non-overlap of contours precisely defines the presence or absence of interference -- or the extent of interference -- in each individual case. We do say that the use of contours predicted according to the best methods available ^{9/} is a reasonable and statistically accurate basis for determining separation requirements. We believe that an assignment system developed on the basis of these fixed separation requirements will achieve results in terms of service to the public which are at least as good as the results achieved through a case-by-case study of service gained or lost by reason of interference.

B. A Hearing Was Not Required

Appellant's claim that it is entitled to a hearing on whether its originally tendered application violated the overlap rule and, if so, whether a waiver is warranted, is clearly lacking

^{9/} As explained, supra, the "best methods available" are set out in the Commission's Rules as being either actual field intensity measurements or theoretical predictions using Figure M-3, with a clear preference for the former method.

in merit. The Commission answered this argument in its February 8, 1967 opinion as follows (J.A. 121):

In the first place, the prohibited overlap found by the Commission, on the basis of the Figure M-3 data relied upon by the applicant, was so extensive as to remove any reasonable doubt as to the invalidity of Natick's claim that no overlap existed at all. In the second place, no adequate reasons have yet been adduced by Natick for a waiver of Section 73.37(a) in this case, in the face of the Commission's clearly expressed intention to waive it only in the most exceptional circumstances. [Footnote omitted.]

Furthermore, appellant did not request a waiver when its application was tendered, or even when it petitioned for reconsideration of the Commission's return of its application. Appellant's basis for claiming a right to a hearing, made for the first time in its Petition for Relief (a second petition for reconsideration), is its contention that the overlap in its original application was either non-existent or de minimis. However, this does not raise a conflict necessitating a hearing. The Commission's preliminary study of appellant's original application clearly revealed that overlap did exist, that this overlap was not de minimis, and that this overlap was such that Section 73.37(a) was violated, thereby rendering appellant's application unacceptable for filing (J.A. 29, 72, 120, 121). This type of determination is one which the Commission properly makes on an informal basis after careful review of the data presented to it. To do otherwise would be to hold a hearing to determine whether a hearing is necessary, truly an

injudicious and wasteful process. Such procedure would effectively destroy the administration of the entire prohibited overlap system by forcing hearings for the sole purpose of determining whether an application was acceptable for filing. We also note here that appellant does not allege that the Commission was in error when it found that the original application reflected overlap.^{10/} Nor did it then seek a waiver. Thus, there was no reason at this point for a hearing. Appellant's later submission of field intensity measurements demonstrating that no overlap actually existed did not reinforce its original showing; rather, it was an entirely new showing. Therefore, it was not in conflict with the Commission's conclusion that the original showing involved overlap. Again, there was no basis for a hearing. As fully set forth supra, the Commission acted reasonably in not accepting this later submission.

Likewise, appellant errs when it states that the Commission should have made findings about the overlap area. First, as we have shown, it is the existence of overlap and not the characteristics of the overlap area which determines whether Section 73.37(a) is violated and therefore whether an application is acceptable for filing. Second, the factors which appellant lists as missing from

^{10/} Compare Mansfield Broadcasting Co., 4 F.C.C. 2d 154 (1966).

the Commission's opinions are the factors used in deciding whether a waiver of the overlap rule is warranted.^{11/} As indicated, appellant did not request a waiver when it tendered its application, or even when it petitioned for reconsideration. When waiver was finally mentioned in the "Petition for Relief," no relevant supporting data was submitted. Appellant's arguments all along went to the acceptance of its second submission, and not to whether the first submission should be accepted via waiver. Thus the "findings" which appellant claims the Commission did not make were never necessary.

It is true that the Commission has a statutory obligation to choose between applicants in order to make a public interest selection of the best applicant. However, as illustrated above, the Commission also maintains a basic allocation scheme in the public interest. These two goals are not conflicting as appellant implies. But if a proposal does not meet the minimum separation requirements, it is not qualified for further consideration. It is difficult to see how this meshing of two policies is restrictive or erroneous. We submit that the prohibited overlap rule is a reasonable exercise of the Commission's licensing and rule making powers.^{12/} Clearly, defective or untimely applications are not

^{11/} See Coastal Broadcasters, Inc., 37 F.C.C. 1002, 1009 (1964); Newcastle Broadcasting Corp., 1 F.C.C. 2d 1124 (1965).

^{12/} See American Airlines, Inc. v. C.A.B., 123 U.S. App. D.C. 310, 359 F.2d 624, cert. denied 385 U.S. 843 (1966), where the need for and importance of policy rule making is thoroughly discussed.

entitled to consolidation. Ranger v. F.C.C., supra; Kittyhawk Broadcasting Corp., 7 F.C.C. 2d 153 (1967).

CONCLUSION

For the foregoing reasons, the Commission's actions should be affirmed.

Respectfully submitted,

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
Counsel,

STUART F. FELDSTEIN,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

July 28, 1967

APPENDIX A

Rules and Regulations of the Federal Communications Commission:

47 CFR §1.227(b) (1) and (4):

(b) (1) In broadcast cases, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended if amended so as to require a new file number, is substantially complete and tendered for filing by whichever date is earlier:

(i) The close of business on the day preceding the day the previously filed application or one of the previously filed applications is designated for hearing; or (ii) the close of business on the day preceding the day designated by public notice published in the Federal Register as the day any one of the previously filed applications is available and ready for processing.

(4) Any mutually exclusive application filed after the date prescribed in subparagraphs (1), (2), or (3) of this paragraph will be dismissed without prejudice and will be eligible for refiling only after a final decision is rendered by the Commission with respect to the prior application or applications or after such application or applications are dismissed or removed from the hearing docket.

47 CFR 1.571(c):

(c) Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first. Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without

designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed applications is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all applications excepting those specified in exception (2) in this paragraph must be filed if they are to be grouped with any of the listed applications.

47 CFR 1.591(b):

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the Commission will not consider any other application, or any other application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete and tendered for filing by whichever date is earlier: (1) The close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration; or (2) the close of business on the day preceding the day designated by public notice in the Federal Register as the day the application under consideration is available and ready for processing.

APPENDIX B

June 8, 1965

A. L. Stein, Esq.
Warner Building
Washington, D. C.

Dear Sir:

Reference is made to the application submitted on behalf of The Heart of the Lakes Broadcasting Company, received in the Commission May 10, 1965 requesting a construction permit for a new standard broadcast station to operate at Estherville, Iowa on 1070 kilocycles, daytime only, utilizing 1000 watts, directional antenna.

Examination of the application discloses that it was not substantially complete for filing by the close of business May 10, 1965 due to the following omissions:

1. No engineering studies were submitted to demonstrate compliance with Sections 1.569 regarding applications for frequencies adjacent to Class I-A channels.
2. No engineering studies were submitted to demonstrate compliance with Section 73.187 where operation is proposed on a Class I-B channel.
3. No engineering studies were submitted to demonstrate whether the proposed antenna site would meet the requirements of Section 73.188 of the Rules regarding coverage with adequate field strength intensities of the proposed city sought to be served.
4. Tables of the areas and populations within the contours included in Paragraph 12-A of the application form were not submitted as specified in Paragraph 13 of the form.
5. The following engineering data was not submitted as required by Section 73.150 of the Rules regarding the proposed directional antenna system.
 - a. Complete description of antenna system.
 - b. Details including sketches of ground system of each element (length and number of radials, etc.).
 - c. Ratio of fields from elements (identifying elements).
 - d. Calculated horizontal (ground) plans field intensity pattern.

A. L. Stein, Esq.

- e. Inverse field intensity at 1 mile and effective field intensity (RSS).
- f. Orientation of array with respect to True North and time phasing of fields from elements as well as space phasing of elements.
- g. Data used in computing the pattern, including the formula utilized, sample calculations, etc.

The Commission has noted that additional engineering data was tendered May 11, 1965 and it appears that the application is substantially complete for filing as of May 11, 1965. However, further study by the Commission's staff discloses that the proposal involves a serious conflict with the application of Tri-State Broadcasters proposing a new AM station for Sioux Center, Iowa, file No. BP-16,461. The Commission released a Public Notice April 2, 1965 (adopted March 31, 1965) listing the Sioux Center proposal as one in which any application involving a conflict necessitating a hearing must be substantially complete and tendered for filing at the close of business on May 10, 1965. Since the Estherville proposal was not substantially complete for filing prior to the May 10, 1965 cut-off date, the application is not timely filed with the Sioux Center proposal.

In view of the foregoing, and pursuant to the provisions of Sections 1.564 and 1.227 of the Commission's Rules, the application cannot be accepted for filing and is returned herewith. One copy of the application is being retained in the Commission for future reference.

Very truly yours,

Ben F. Waple
Secretary



REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION.

Appellee.

Appeal From Memorandum Opinions And Orders of The
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 20 1967

Nathan J. Paulson
CLERK

JEROME S. BOROS

JEROME LIPPER

Fly, Shuebruk, Blume And Gaguine
30 Rockefeller Plaza
New York, New York 10020

Counsel for
Natick Broadcast Associates, Inc.

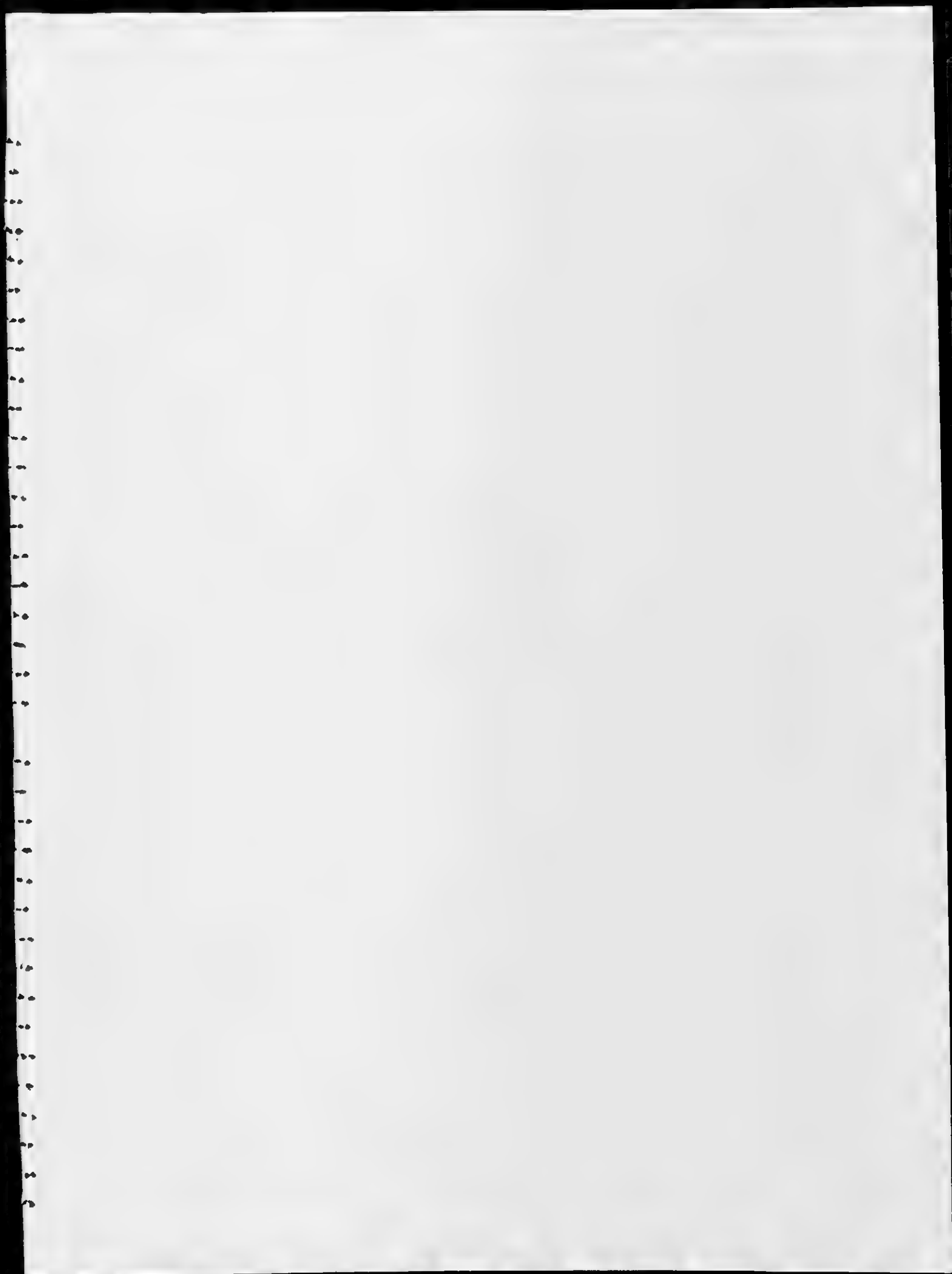


TABLE OF CONTENTS

	<u>Page</u>
I. The Commission's Draconian Application Of The Overlap Rule In This Case Is Without Record Or Rational Support	1
II. Judicial Decisions Require Acceptance of Appellant's Application	7
III. The Communications Act, As Consistently In- terpreted By the Commission, Requires Ac- ceptance Of the Application	8
IV. Absent Outright Acceptance Of the Application A Hearing As To Its Acceptability Is Necessary	11
V. Conclusion	12

TABLE OF AUTHORITIES

Cases:

* Albertson v. F.C.C., 87 U.S. App. D.C. 38, 182 F. 2d 397 (1950)	2, 7, 8
Ashbacker Radio Corporation v. F.C.C., 326 U.S. 327 (1943)	2, 7, 8, 9
Gross v. Saginaw Broadcasting Co., 305 U.S. 613 (1938)	6
Jones v. Guaranty And Indemnity Co., 101 U.S. 622 (1879)	8, 9
Melody Music, Inc. v. F.C.C., 120 U.S. App. D.C. 241, 345 F. 2d 730 (1965)	10
Saginaw Broadcasting Co. v. F.C.C., 68 U.S. App. D.C. 282, 96 F.2d 554 (1938)	6
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)	11

PageAdministrative Decisions

Charles W. Jobbins et al, 3 Pike & Fischer RR 2d 302 (1964)	. . . . .	10, 11
Fine Music, Inc., 9 Pike & Fischer RR 2d 219 (1966)	. . . . .	10
Molly Pitcher Broadcasting Company, Inc., (F.C.C. Report No. 7980, released February 10, 1967)	. . . . .	10
*Orange Nine, Inc., 9 Pike & Fischer RR 2d 1157 (1967)	. . . . .	9, 10
Virginia Broadcasters, 10 Pike & Fischer RR 2d 833 (1967)	. . . . .	11

*Cases chiefly relied upon are marked with an asterik.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION.

Appellee.

Appeal From Memorandum Opinions And Orders of The
Federal Communications Commission

REPLY BRIEF FOR APPELLANT

I

THE COMMISSION'S DRACONIAN APPLICATION OF
THE OVERLAP RULE IN THIS CASE IS WITHOUT
RECORD OR RATIONAL SUPPORT

A.

As a threshold matter, it is clear — and undisputed by Appellee — that Appellant's application as originally tendered — and rejected — did not violate the overlap rule in any respect. The mirage

of overlap — of *de minimis* degree — which existed on the basis of "preliminary" Commission review of the application, seasonably was dispelled by Appellant's petition for reconsideration. In that paper, Appellant firmly established by "best evidence" that no overlap inhered in its application — which otherwise complied with all Commission Rules and requirements.

At that juncture, the Commission was aware that its "preliminary" determination was based on a misapprehension. Appellee thus was confronted with the question whether Appellant's application should be accepted or rejected. In the case of the Commission, an agency charged with developmental responsibilities in the broadcast field, *the duty to reconsider no less than "the power to reconsider is inherent in the power to decide."* *Albertson v. Federal Communications Commission*, 87 U.S. App. D. C. 38, 182 F.2d 397 (1950).¹ Even so, given opportunity as well as authority, Appellee declined to reconsider its overlap findings, knowing full well that it thus was depriving Appellant of *Ashbacker*² rights — on the basis of an erroneous evidential predicate.

Appellee carried forward this position, with its corollary foreclosure of the Commission's opportunity to choose between otherwise qualified applicants,³ in its definitive Order of February 8, 1967 (J.A. 115-123). Its justification was administrative convenience, present and

¹ The *Albertson* case is discussed *infra*, p. 7,

² *Ashbacker Radio Corporation v. Federal Communications Commission* 326 U.S. 327 (1943) established the right of seasonably filed bona fide mutually exclusive applications to consolidated hearing.

³ Appellant below stressed that forfeiture of its *Ashbacker* rights i.e., rights to a hearing, would deprive the Commission of the opportunity of "selecting amongst all the qualified applicants the one best suited to serve the public . . . in derogation of the spirit of Section 303(g) of the Communications Act of 1934, as amended, which directs the Commission to "encourage the larger and more effective use of radio in the public interest" (J.A. 80; J.A. 110, 113, 114). In its definitive Order below (J.A. 118-123) the Commission did not articulate its reasons for disregarding this consideration in denying Appellant relief.

prospective. Appellee concluded that forfeiture of Appellant's hearing rights presently would facilitate the processing of pending applications, and prospectively, would deter the submission of technically defective applications.

B.

Upon appeal, the Commission contends that its refusal below to accord weight to the reconsideration petition, with its material explanatory and reinforcive of Appellant's timely-tendered application, expedited the processing of Corporation's application. The Commission argues that, since no other acceptable application had been tendered by the May 10, 1965 cut-off date, Corporation's application as it stood on that date was suitable for final processing, and ultimate grant, which occurred on July 5, 1967. The facts, however, are to the contrary.

Although Corporation's original application had been amended prior to acceptance for filing so as to eliminate overlap and establish acceptability for filing, the application still had not been perfected by the May 10, 1965 cut-off date. It required further amendment as Appellant noted in a pleading, dated March 4, 1966, which duly was served on Corporation.

Thereafter, on March 21, 1966, Corporation responsively tendered a twenty-page amendment.⁴ The amendment failed to cure the defective condition. Accordingly, a year later, on March 29, 1967, following the Commission's third successive refusal to accord Appellant's *original* and *unamended application* comparative consideration with Corporation's already twice-altered application, the Commission recommended to Corporation that it amend for the third time.

Corporation then recast its entire application to put into fit condition for final processing. By amendment of May 8, 1967, which almost marked the two year anniversary of the cut-off date, Corporation again

⁴ Appellant did not plead thereto. It was unaware of the amendment because this responsive document was not served on Appellant.

revised its proposal. According to Corporation's own enumeration, set forth in a letter of transmittal, the application was altered in the following nine substantial respects:

"The accompanying data, material and exhibits hereinafter furnished will reflect:

1. The lease of a new site to conform to the suggestion of the Federal Communications Commission to prevent the 5 mv/m penetration of Newton.
2. The additional stock interest of each of the two new stockholders.
3. The availability of:
 - (a) \$20,000.00 additional cash capital investment.
 - (b) additional cash investment by demand notes
 - (c) a line of credit from a bank up to \$40,000.00 for loans
 - (d) an additional credit arrangement for equipment in the amount of approximately \$16,000.00.
4. The replacement of three Advisors.
5. A change in three directors to bring out a strengthening of the Corporation.
6. Engineering data showing conformity to the requirement of the Policy Statement on section 307(b) for standard broadcasting involving suburban communities.
7. The financial statements in connection with the demand notes payable to the Corporation.
8. Commitment from the bank for the loan of \$40,000.00
9. Commitment from Gates Radio Company in connection with the extension of credit on construction facilities."

These changes involved every aspect of the application, but particularly, Corporation's technical showing. In Corporation's words, the new engineering showing entailed relocating Corporation's "proposed transmitter/antenna site approximately three miles Southwest" (Amendment of May 8, 1967) (Exhibit A-1, p. 1). In turn, the locations of Corporation's proposed contours were changed and Corporation made

a completely new showing negating overlap as to Station KYW, Philadelphia, Pennsylvania.

In short, the Draconian trinity of Commission orders rejecting Appellant's application *all* occurred while the Commission was *processing and reprocessing* Corporation's application. Comparison of the two applications revealed that Appellant's application at all times has remained unchanged as to such elemental engineering matters as site, tower, height, and contour locations, while Corporation's application has been as constant as a weather-vane as to such basic ingredients. The contrast is pointed up by the following schematic representation reflective of variances in site and height in Corporation's application at such critical milestones as date of tender, cut-off date and date of grant.

Corporation's Application

	<u>Tender Date</u>	<u>Cut-Off Date</u>	<u>Grant</u>
	(September 23, 1964)	(May 10, 1965)	(July 5, 1967)
Site:	1/2 mile West of Oak Street on Route 9, Natick, Massachusetts	1/2 mile West of Oak Street on Route 9, Natick, Massachusetts	4 Speen Street, Natick, Massachu- setts
Tower Height:	230 ft.	140 ft.	140 ft.

The record thus rejects the Commission's rationalization -- Appellee's summary dismissal of Appellant's application did not profit the Commission's processes nor spare the Commission "procedural disarray" flowing from reconsideration of a matter which had been "closed" (J.A. 118). Only Corporation was spared-from a comparative hearing, the Commission's classic technique of selecting from amongst multiple applicants the one which best would serve the public. The loss inherent in the Commission's self-imposition of a Hobson's choice in

the assignment of the 1060 kc frequency in Natick, Massachusetts, was not counterbalanced by any public gain.

C.

The deterrent value of defaulting Appellant's application constitutes a second rationalization for the result below. With rhetorical flourish but without record findings the Commission concluded the summary dismissal of Appellant's application was necessary lest, "as in Gresham's law — engineering work of poorer quality would tend to drive out *costlier* but more carefully prepared engineering submission." (J.A. 122) (Emphasis added).

This pivotal assumption flouts both statute and judicial decisions. An unbroken line of law proscribes assumptions and prescribes findings as a *sine qua non* to responsible regulatory determination.

The requirement of findings neither is ritualistic nor formalistic. Findings are functional — they forestall arbitrariness, curb error, and enable a court to determine whether the action under review is soundly grounded. As this Court observed in *Saginaw Broadcasting Co. v. Federal Communications Commission*, 68 U.S. App. D.C. 282, 96 F.2d 554 (1938), *cert. den. sub nom. Gross v Saginaw Broadcasting Co.*, 305 U.S. 613 (1938):

"The requirement that courts and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions of review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law, or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court

or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect to commissions as it is in respect to courts."

This rationale has particular applicability to this case. Here, findings would have disclosed the unreasonableness of the Commission's premise that penalizing Appellant's laymen principals will render future engineering submissions to the Commission letter perfect. Perfection is beyond human attainment; even Commission engineers err.

II

JUDICIAL DECISIONS REQUIRE ACCEPTANCE OF APPELLANT'S APPLICATION

Decisions of the Supreme Court and this Court fuse to require Commission acceptance of Appellant's application. The cases are *Ashbacker Radio Corporation*, 326 U.S. 327 (1943) and *Albertson v. Federal Communications Commission*, 87 U.S. App. D.C. 38, 82 F.2d 397 (1950).

Ashbacker holds that the Communications Act vouchsafes a hearing with mutually exclusive applications to all seasonably filed bona fide applications. *Albertson's* import is that a minor blemish does not divest an application of its *Ashbacker* rights.

In *Albertson*, the Court passed on the propriety of the Commission's dismissal of an application for rehearing. The application timely had been submitted as of right but the Commission dismissed the

application out-of-hand on the ground that accompanying engineering material was insufficient under the Commission's Rules. The Commission declared there was no alternative. This Court disagreed saying:

"This we think was too narrow a view. Other courses were open. Assuming the affidavit accompanying the application was insufficient, an amendment could have been allowed or ordered. Ordinarily that would be appropriate. Federal Rule 15(a) illustrates the modern liberality in allowing amendments. While the Commission's procedure is not governed by the Federal Rules 'administrative procedure is, and should be simpler, less formal and less technical than judicial procedure. Certainly it should not be more so in the absence of clear and specific mandate from Congress' . . ."

The factual similarity of *Albertson* to this case needs no comment. *Albertson* brings this case within *Ashbacker's* ambit. The Commission's action below improperly denied Appellant its *Ashbacker* rights.

III

THE COMMUNICATIONS ACT, AS CONSISTENTLY INTERPRETED BY THE COMMISSION, REQUIRES ACCEPTANCE OF THE APPLICATION

Premium service to the public is prescribed by the Communications Act. The statute precepts this goal as fundamental. The Commission is directed "to promote the larger and more effective use of radio in the public interest" (Communications Act of 1934, as amended, §303 (g)). Therefore in any collision between maximizing service to the public (public convenience) and maximizing the convenience of the Commission (administrative convenience), the latter traditionally has yielded to the former. In keeping with the doctrine that "equity abhors forfeiture" (*Jones v. Guaranty and Indemnity Co.*, 101 U.S. 622, 628 (1879)), the Commission regularly has declined to decide matters on the basis of attrition, notwithstanding the administrative convenience implicit therein. This

case constitutes an inexplicable — and unexplained⁵ — exception to this rule.

This is strikingly illustrated by comparative study of the instant decision and the Commission's almost contemporaneous decision of April 9, 1967 in *Orange Nine, Inc.*, 9 Pike & Fischer RR 2d 1157 (1967).⁶ In each case *Ashbacher* rights were at stake. In each case the core question was whether, in determining the acceptability of an application for filing (so as to entitle it to *Ashbacher* rights), the Commission should insist upon inflexible technical conformance with the Commission's rules.

In this case, the Commission so insisted, and without discussing countervailing considerations, and without benefit of sustaining findings, held that such a harsh rule was justified on the ground that forfeiture of Appellant's hearing rights in this case would cause laymen principals to forestall engineering errors on the part of their technical advisors in other cases. In *Orange Nine*, which, as noted, was quoted verbatim in Appellant's Brief without answer by Appellee, the Commission came to a different conclusion as to the appropriate public interest standard for gauging the acceptability of applications. In assessing whether it should bar Weiss, one of eight applicants from a comparative proceeding, because of a technical deficiency in his application, the Commission, without referring to the *ratio decidendi* of this case, opted to preserve for itself the widest possible choice of applicants. That is, notwithstanding that there were seven other applicants from whom to choose in *Orange Nine*, the Commission nonetheless consolidated Weiss' application for

⁵ See note 3, *supra*.

⁶ The *Orange Nine* decision was discussed in Appellant's Brief (p. 19), and the entire text of the decision was reprinted in the Supplement to the Brief (S. 20). Appellee's Brief, however, is silent as to this case.

hearing saying:

"We think that this is too important a matter to warrant dismissal of bona fide applications on technical grounds, the public interest lies in enabling us to make a choice among these applicants on the basis of merit, rather than by attrition. *Charles W. Jobbins, et al.* FCC 64-743, 3 RR 2d 302."

The *Jobbins* case is to the same effect. There the Commission prescribed a March 31, 1964 "cut-off" date for the submission of applications for 1110 kc in the Pasadena, California area. Of a total of nineteen applications tendered for filing on the cut-off date, four applications were incomplete in that their engineering submissions partially failed to comply with the Commission's Rules. The Commission, however, decided that "the submission requirements of Section V-A of FCC Form 301 should be waived to the extent necessary to permit consideration of these applications on their merits". 3 Pike & Fischer RR 2d at 305. Each of the four applicants involved was accorded sixty days from the release date of the Commission's Order in which to complete its application.

The principle of these cases also underlies, among other cases, *Fine Music, Inc.* and *Molly Pitcher Broadcasting, Inc.*, which were discussed and reproduced in Appellant's Brief. Although Appellee's Brief seeks to distinguish these cases from the present matter, the effort re-emphasizes rather than rebuts their relevance. To be sure, there are distinctions among the cases, as there are among all cases, but the distinctions are superficial not substantive.

This Court frequently has pointed out distinctions unrelated to statutory purpose. As this Court noted in *Melody Music, Inc. v. F.C.C.*, 120 U.S. App. D.C. 241, 345 F. 2d 730 (1965):

" . . . the Commission must explain its reasons and do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act."

Commission caselaw thus uniformly calls for acceptance of the application. To be sure, *Virginia Broadcasters*, 10 Pike & Fischer RR 2d 833 (1967) cited in Appellee's Brief (p. 17), seemingly points the other way but that case has no independent vitality — it derives its authority solely from the precedential value of this case. In short, Appellee's reliance on *Virginia Broadcasters* constitutes classic bootstrap logic — and strikingly emphasizes the essential emptiness of the Commission's position.

IV

ABSENT OUTRIGHT ACCEPTANCE OF THE APPLICATION A HEARING AS TO ITS ACCEPTABILITY IS NECESSARY

Appellee has failed to effectively rebut Appellant's contention that (Brief, p. 18):

" . . . a hearing is mandated, if allegations have been made which, if true, are sufficient to justify a waiver of the overlap rule. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)"

Appellee's answer — which consists of a "parade of horrors" — essentially questions the correctness of the Supreme Court's decision in the *Storer* case. However, Appellee's quarrel with this holding does not derogate from its binding effect — and it mandates a hearing under the instant circumstances.

CONCLUSION

For the reasons stated in Appellant's opening brief and herein, this case should be reversed and remanded to the Commission with instructions that Appellant's application should be accepted for filing and consolidated for comparative hearing with the application of Corporation. Alternatively, and at a minimum, the Commission should be instructed to accord Appellant a hearing to determine whether waiver of the overlap rule is warranted.

Respectfully submitted,

JEROME S. BOROS

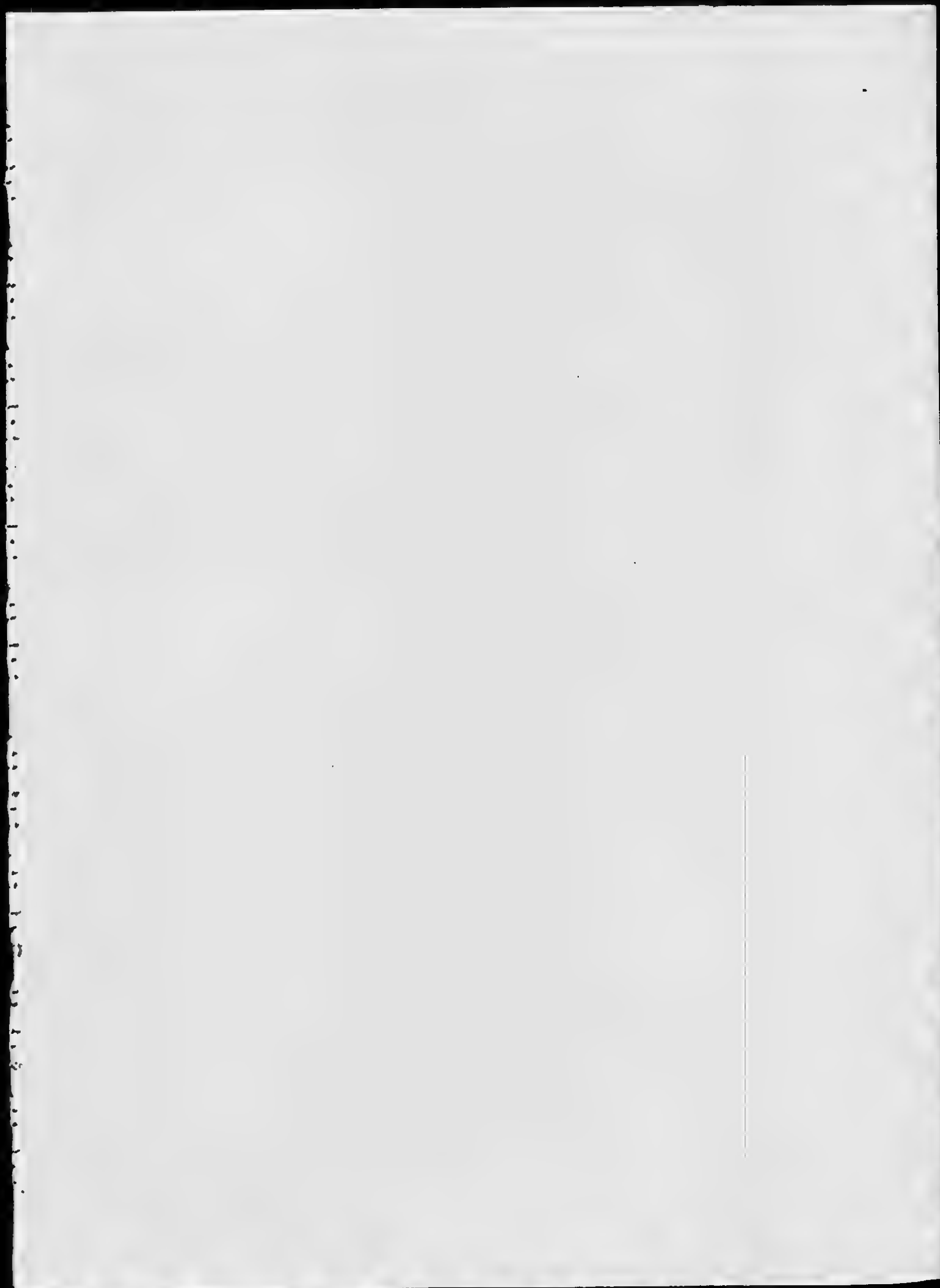
JEROME LIPPER

30 Rockefeller Plaza
New York, New York 10020

Counsel for
Natick Broadcast Associates, Inc.

Of Counsel:

Fly, Shuebruk, Blume and Gaguine
30 Rockefeller Plaza
New York, New York 10020



BRIEF FOR AMICUS CURIAE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC., *Appellant*,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

APPEAL FROM MEMORANDUM OPINIONS AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

HAROLD HORVITZ
GITTA M. KURLAT
Guterman, Horvitz & Rubin
50 Congress Street
Boston, Massachusetts

United States Court of Appeals
for the District of Columbia Circuit

THOMAS D. BURNS
STEPHEN N. SUBRIN
Burns & Levinson
77 Franklin Street
Boston, Massachusetts

FILED SEP 14 1967

Nathan J. Paulson
CLERK

BENNETT BOSKEY
EDWARD A. GROOBERT
Volpe, Boskey and Lyons
918 16th Street, N. W.
Washington, D. C. 20006

*Counsel for
Barkley & Dexter Laboratories,
Inc. and Norman L. Rivers,
Amicus Curiae*

September, 1967

(i)

INDEX

INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
Appellant Was Entitled by Statute to a Hearing and the Commission Acted Arbitrarily and Unlawfully in Return- ing Appellant's Application Without a Hearing	3
CONCLUSION	13

CITATIONS

CASES:

<i>*Ashbacker Radio Corp. v. Fed. Commun. Com.</i> , 326 U.S. 327 (1945)	4
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957)	9
<i>*Folkways Broadcasting Co. v. F.C.C.</i> , __ App.D.C. __, 375 F.2d 299 (1967)	4
<i>Foman v. Davis</i> , 371 U.S. 178 (1962)	9
<i>Gillespie v. United States Steel Corp.</i> , 379 U.S. 148 (1964) ...	9
<i>Heitmeyer v. Federal Communications Commission</i> , 68 App. D.C. 180, 95 F.2d 91 (1937)	11
<i>Interstate Broadcasting Company v. F.C.C.</i> , 105 App.D.C. 224, 265 F.2d 598 (1959)	9
<i>Kessler v. F.C.C.</i> , 117 App. D.C. 130, 326 F.2d 673 (1963) ...	4
<i>Maty v. Grasselli Co.</i> , 303 U.S. 197 (1938)	9
<i>Office of Communication of United Church of Christ v. F.C.C.</i> , 123 App.D.C. 328, 359 F.2d 994 (1966)	4
<i>*Orange Nine, Inc.</i> , 9 Pike & Fischer RR2d 1157	10, 11
<i>Radio Station WOW v. Federal C. Commission</i> , 87 App.D.C. 26, 184 F.2d 257 (1950)	4
<i>Ranger v. F.C.C.</i> , 111 App.D.C. 44, 294 F.2d 240 (1961)	8, 10
<i>Ridge Radio Corporation v. F.C.C.</i> , 110 App.D.C. 277, 292 F.2d 770 (1961)	8

(ii)

<i>Spanish International Broadcasting Co. v. F.C.C., C.A.D.C.</i>	
No. 21,326, April 18, 1967	8
<i>Tiller v. Atlantic Coast Line</i> , 323 U.S. 574 (1945)	9
* <i>United States v. Storer Broadcasting Co.</i> , 351 U.S. 192 (1956) ...	4

STATUTES AND REGULATIONS:

Federal Communications Act, 47 U.S.C.:

§303(g)	9
§307(b)	9
§308(b)	7
§309	4, 7
§309(a)	4, 9
*§309(e)	2, 4

Rules and Regulations of the Federal Communications
Commission, 47 C.F.R.:

§1.3	10
§73.37(a)	5
§73.152	6
§§73.181 - 73.184	5
§73.182(g)	6
§73.183(a)	6
§73.183(c)	6

*Cases and other authorities chiefly relied upon are marked with an asterisk.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,834

NATICK BROADCAST ASSOCIATES, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

*APPEAL FROM MEMORANDUM OPINIONS AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION*

BRIEF FOR AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Amicus Curiae—namely, Barkley & Dexter Laboratories, Inc. (“Laboratories”) and Norman L. Rivers—supports the appeal taken to this Court by Natick Broadcast Associates, Inc.¹

Laboratories, an engineering consulting firm, was engaged to prepare the technical portions of appellant’s application to the FCC for a radio station construction permit. Laboratories has been instrumental in preparing the technical portions of a large number of such broadcast license applications;

¹We have lodged with the clerk the parties’ written consents to the filing of a brief Amicus Curiae.

its qualifications are well known to the FCC. Moreover, the qualifications of Laboratories' radio measurement engineers — particularly Norman L. Rivers, who prepared the technical exhibits used here by appellant — are on file with the FCC (JA 4-5).

On the basis of the FCC actions (here being appealed) in rejecting appellant's license application because of alleged error in computation of the 0.005 mv/m contour (JA 29), appellant has instituted a negligence suit against Laboratories and Norman L. Rivers, seeking one million dollars in damages. That suit is pending in the Massachusetts courts.

SUMMARY OF ARGUMENT

The FCC erred in rejecting without a hearing appellant's complete and timely license application. Section 309(e) of the Communications Act clearly requires a full hearing to determine any substantial and material question of fact presented by an application. Whether or not overlap in fact exists in this case is a substantial and material question of fact. This factual question arises from a conflict between the FCC's preliminary theoretical determination and the determination by appellant's experts, reinforced by empirical data showing there is no overlap.

The FCC acted arbitrarily and unlawfully when it refused to hold a hearing and refused to consider appellant's empirical data on the ground that appellant had submitted the empirical data after the cut-off date. FCC's cut-off rule cannot properly be applied to exclude evidence subsequently submitted to resolve a substantial and material question of fact presented by a complete and timely application. Moreover, in this case the FCC's harsh and unreasonable application of the cut-off rule defeats the basic purpose of the Communications Act by preventing the FCC from considering whether a qualified and timely applicant is best equipped to serve the public.

The case accordingly should be remanded to the Commission with instructions to accept appellant's application for filing.

ARGUMENT

Appellant Was Entitled by Statute to a Hearing and the Commission Acted Arbitrarily and Unlawfully in Returning Appellant's Application Without a Hearing

In the circumstances of this case, appellant was clearly entitled to a hearing on its license application. It was arbitrary and unlawful for the FCC to return the application to appellant without according any hearing.

Appellant made a timely tender of a complete application for a construction permit for a first radio station at Natick, Massachusetts. As required by FCC rules, the application set forth that the proposed operation of the station would not involve any prohibited overlap of signal strength with any other station (JA 7). Appellant's detailed showing that there would not be any overlap was based on a soil conductivity map prepared by the FCC for use in predicting on a theoretical basis whether overlap would exist. However, the FCC rejected appellant's timely application, without according appellant a hearing, because the FCC Staff, on the basis of a "preliminary examination" of the application and the theoretical map, concluded that an overlap was "indicated" and that appellant's computation might not be correct (JA 29). Thereafter, appellant made field intensity measurements which confirmed that in fact no overlap would occur. Appellant then filed a Petition for Reconsideration of the FCC rejection of the application, which it supported with the detailed engineering data confirming the absence of overlap (JA 31). The FCC refused to consider this data; it denied appellant a hearing on the question of whether there in fact would be any overlap; and it refused to consider appellant's application on the merits. It did this despite the fact that appellant's application originally had been tendered before

the so-called "cut-off" date. The FCC placed its reliance on the fact that appellant's application had originally been rejected on the basis of the FCC Staff's interpretation of the theoretical map and on the further fact that the field intensity measurements confirming in detail the absence of overlap were submitted after the cut-off date for filing applications (JA 71-73; see JA 115-123).

1. The Commission plainly violated Section 309 of the Federal Communications Act. The Supreme Court has stated that Section 309(a) "gives applicants a right to a hearing before their applications are denied". *Ashbacker Radio Corp. v. Fed. Commun. Com.*, 326 U.S. 327, 330 (1945). Moreover, Section 309(e) of the Act requires the FCC to grant a "full hearing" on a license application if "a substantial and material question of fact is presented".² This is mandatory. Accordingly, where there are unresolved factual issues the applicant must be permitted to give and refute evidence. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956); *Folkways Broadcasting Co. v. F.C.C.*, ___ App. D.C. ___, 375 F.2d 299, 301 (1967); *Kessler v. F.C.C.*, 117 App. D.C. 130, 143-145, 326 F.2d 673, 686-688 (1963); compare *Radio Station WOW v. Federal C. Commission*, 87 App. D.C. 226, 229, 184 F.2d 257, 260 (1950); *Office of Communication of United Church of Christ v. F.C.C.*, 123 App. D.C. 328, 359 F.2d 994, 1006-1009 (1966).

²Section 309(e) provides, in material part:

"(e) If, in the case of any application to which subsection (a) of this section applies, a *substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection*, it shall formally designate the application for hearing on the ground or reasons then obtaining . . . Any hearing subsequently held upon such application shall be a *full hearing* in which the applicant and all other parties in interest shall be permitted to participate". (Emphasis Added)

Here a "substantial and material question of fact" was presented. It arose out of the so-called "overlap"³ provisions of FCC's rules, which provide, in part:

"(a) Except as indicated in other paragraphs of this section, and except for Class II-A stations, no application will be accepted for a new station (or change in frequency) if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph. . . ." 47 C.F.R. §73.37 (a).

The FCC rules permit alternative methods for plotting ground wave contours in order to determine whether there would be any overlap. One method entails actual field intensity measurements. In the second method, contours may be predicted on a theoretical basis by use of the data reflected

³"Overlap" describes interference created by the transmission of the signal of an applicant broadcasting station with the signal transmitted by one or more existing broadcasting stations. Overlap occurs whenever the protected service area, as described by the pertinent contour, of an existing broadcasting station crosses or overlaps the signal that would be transmitted by the applicant. The protected service area for each station is obtained by either calculating or measuring the intensity attenuation of the signal projected along an azimuth radial from the location of the antenna to a point where the signal has decreased to an insignificant level, as defined under Commission rules (47 C.F.R., §§73.181 - 73.184). This is accomplished by projecting radials at several azimuth bearings in critical directions (potential overlap areas) and determining the attenuated signal intensity at several points along each radial. In determining the diminishing level of signal intensity a number of factors such as soil content, topography, and antenna height must be taken into consideration. By connecting the various signal intensities of similar value along the various bearings projected by the radials, a set of contours is formed. The pertinent contour is the contour located at the signal intensity which encloses the protected service area and is protected by the Commission from interference by the pertinent contour of another broadcasting station. Consequently if the pertinent contour of the prospective station is outside the area of the pertinent contour of another station of similar classification, no overlap prohibited by the Commission will occur.

on the FCC's soil conductivity map. 47 C.F.R. §§73.152, 73.182(g), 73.183(a), 73.183(c). Appellant's application originally used the second method (the Commission's soil conductivity map) to support its position that no overlap would occur. Appellant's application contained engineering exhibits and data prepared by Laboratories, an engineering firm experienced in FCC license preparation. These exhibits and data were prepared in accordance with professional standards; and it should be noted that the number of radials chosen, the azimuthal bearings, and the number and location of signal intensities obtained along each radial, are matters of professional judgment, and are established by the particular engineer undertaking the determination. The initial study by Laboratories, based on acceptable M-3 contour predictions, indicated no overlap.

However, the FCC Staff interpreted the theoretical exhibit attached to appellant's initial application, as enlarged by the projection of an additional assumed azimuth radial (Appellee's Brief, pp. 10-11), as indicating overlap, and the FCC rejected appellant's application. The FCC's rules state that in the determination of overlap "field intensity measurements will take precedence over theoretical values" (47 C.F.R. §73.152), and accordingly appellant thereafter conducted an actual field intensity study to reinforce its original conclusion of lack of overlap. This study showed that, as appellant had initially asserted, appellant's proposed radio station would not involve any overlap (JA 31-38), and appellant filed a petition for reconsideration on the basis of this study. The FCC nevertheless refused to hold a hearing or to consider the field intensity measurements demonstrating the absence of overlap.

The FCC apparently is arguing that, once an application has been filed and the cut-off date has passed, this ends the opportunity to present evidence or rebuttal evidence on a technical fact issue. It is as if a party in a civil suit were required in its first pleading, without having heard the other side, to include all of its evidence, rebuttal evidence, cross-examination and final argument. An application, like a com-

plaint, is not the applicant's entire case; it is the commencement of proceedings. When a material and relevant question of fact is presented in connection with the application, such as whether the proposed operation would involve any overlap, the Act does not permit the FCC to dismiss the application summarily without affording the applicant the hearing required by Section 309.

2. The FCC's refusal to consider the detailed engineering study (a study which confirmed that in fact no overlap would occur) was based on an extremely technical and clearly arbitrary application of the FCC cut-off rule. Its reasoning is contrary to the public interest—which must be the overriding consideration governing FCC's actions in such matters—and is directly contrary to the sensible and equitable principles FCC has applied in other cases.

Appellant's application was submitted on time (JA 3). It was complete on its face and met the basic requirements set forth in Section 308(b).⁴ It answered all of the many questions asked (JA 4-28). Once the basic essentials required by Section 308(b) have been set forth by an applicant, the Commission must follow the statutory procedures. There is no provision in the statute for rejecting out of hand and returning to the applicant a completed application submitted

⁴Section 308(b) provides, in material part:

"(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked."

on time. If the Commission cannot grant such application outright, the plain meaning of Section 309 is that the Commission must notify the applicant of the basis therefor and provide the applicant an opportunity to be heard. Compare *Spanish International Broadcasting Co. v. F.C.C.*, C.A.D.C. No. 21,326, April 18, 1967, Slip Op. pp. 11-12.

Under the cut-off rule all applicants must submit their application on or before a specified date. A tardy application would not be accepted for filing. This cut-off date is applicable to the filing and not the processing of applications. *Ranger v. F.C.C.*, 111 App. D.C. 44, 294 F.2d 240 (1961).

But here the FCC has applied its cut-off rule in an arbitrary and unlawful manner which is especially offensive to fair and orderly procedure. Rather than seeking to discern whether a timely application entitled appellant to a hearing, the Commission instead appears to have looked at the application to determine whether appellant would prevail at a hearing. In substance, the FCC first decided that overlap is "indicated"—without further evidence, rebuttal, cross-examination or hearing— and then informed appellant it could not have a hearing because there is overlap.

The cut-off rule does not determine at which point an applicant can no longer introduce evidence, since hearings are invariably subsequent to the cut-off date. Submission of the petition for reconsideration in no way altered the specifications of the radio station which appellant seeks to operate. The tower height, power, frequency and other critical values provided originally have in no way been changed. No new information has been submitted at any point (JA 31-64) which would require the competing applicant in any way to alter its application. Appellant in its petition for reconsideration merely sought to have its evidence heard and to refute the FCC Staff's contention that there would be prohibited overlap if appellant were permitted to operate the proposed station.

Reasonably interpreted—as in *Ranger v. F.C.C.*, *supra*, and *Ridge Radio Corporation v. F.C.C.*, 110 App. D.C. 277, 292

F.2d 770 (1961), this Court indicated it should be—the cut-off rule is comparable to a statute of limitations. An applicant, like a plaintiff in a civil case, must get to court on time. He must either file his initial pleading on time or be barred. But certainly the cut-off rule cannot mean that all documentary evidence, testimony, and questions to be asked on cross-examination, must be submitted at the same time that the complaint or application is filed. That is the purpose of a hearing.⁵

In this case the consequence of the FCC's harsh and arbitrary application of its cut-off rule is to defeat the basic purpose of the Communications Act. The standard established by Section 309(a) requires that the public interest, convenience and necessity must be served. In particular, Section 307(b) requires the Commission to determine whether or not the public interest requires the granting of an application so as to provide a "fair, efficient, and equitable distribution of radio service", while Section 303(g) imposes upon the Commission the duty generally to "encourage the larger and more effective use of radio in the public interest". The interest of the public is foremost, whether there be one or many applicants for a particular frequency allocation. *Interstate Broadcasting Company v. F.C.C.*, 105 App.D.C. 224, 226, 265 F.2d 598, 600 (1959). The need for a reasonable interpretation and application of the Commission's rules is evident if the fundamental statutory purpose is to be implemented.

⁵Compare also the numerous decisions of the Supreme Court to the effect that in the federal courts the purpose of pleading "is to facilitate a proper decision on the merits", e.g., *Conley v. Gibson*, 355 U.S. 41, 48 (1957); *Foman v. Davis*, 371 U.S. 178 (1962); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 158 (1964), even when amendments are made after expiration of the statute of limitations. *Maty v. Grasselli Co.*, 303 U.S. 197, 200 (1938); *Tiller v. Atlantic Coast Line*, 323 U.S. 574, 580-581 (1945).

The FCC rules themselves embody this philosophy by providing a procedural mechanism for their waiver.⁶ As a result, an application otherwise at variance with prescribed requirements often will not be considered defective if accompanied by a request for a waiver. Certainly the appellant's application, which does not in fact show overlap and which is complete on its face, merits consideration at least as favorable.

The *Ranger* case, *supra*, relied on in appellee's brief (p. 19), in no way militates against our argument. Wholly unlike the present case, the *Ranger* application was patently deficient "in major material respects". 111 App.D.C. at 47, 294 F.2d at 243. *Ranger* did not submit a completed application and then seek the right to present reinforcing evidence at a hearing. Its application failed to submit the requisite schedule of programs, failed to answer a question as to whether the applicant was controlled by any person who had an interest in broadcast stations, failed to show the date of the partnership agreement of the applicant, failed to submit an exhibit referenced in the list of exhibits in the application, and failed to submit a balance sheet for one partner and an income statement for another. There were no such omissions in appellant's application.

Here the rejection of the appellant's application precluded consideration of a qualified applicant, so that the Commission shut itself off from determining which of the two competing applicants would provide better service to the public. Such an arbitrary disregard of the public interest offends the statutory criteria. It also is inconsistent with the more recent pronouncement by the FCC itself in *Orange Nine, Inc.*, 9 Pike & Fischer RR2d 1157, released April 7, 1967—a decision which the appellant has relied on (Brief, pp. 19-20 and S-21 at S-26 and S-27) but which the Appellee's Brief has chosen

⁶"Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. §1.3.

totally to ignore. In *Orange Nine*, the FCC refused to reject an application where vital supplemental information was furnished by amendment after the cut-off date, saying: "We think that this is too important a matter to warrant dismissal of bona fide applications on technical grounds; the public interest lies in enabling us to make a choice among these applicants on the basis of merit, rather than by attrition" (S-27).

The FCC's rejection of appellant's application may not only deprive the public of the most efficient radio service, but will seriously and unjustly injure the reputation of (and if appellant should by the remotest chance prevail in its civil action, will literally destroy) Laboratories and Mr. Rivers. Laboratories and Mr. Rivers are innocent third parties who will grievously suffer from the Commission's decision unless afforded an opportunity to rebut the alleged claim of technical error raised by the Commission.

It is undisputed that Congress has vested the Commission with extensive discretion to effect efficiencies of administration. This does not mean, however, that it is proper for the Commission to interpret administrative rules in a vacuum, without regard to the public interest; and it certainly does not mean that the Commission may utilize its cut-off rule, intended to prevent tardiness, for the purpose of denying to a punctual applicant the statutory right of a hearing. As this Court has stressed in *Heitmeyer v. Federal Communications Commission*, 68 App. D.C. 180, 189, 95 F.2d 91, 100 (1937), "convenience of administration cannot be permitted to justify noncompliance with the law, or the substitution of fiat for adjudication".

3. The fact that appellant's application was submitted on the "very last day" (JA 119; see also Appellee's Brief, pp. 2, 17) does not furnish the slightest justification for the FCC's refusal to grant a hearing or to consider the supplemental evidence which appellant submitted after the cut-off date in support of the application. The Public Notice fixing the cut-off date of May 10, 1965 was issued on April 2, 1965

(JA 73). Thus, appellant had less than six weeks for submitting its application. The FCC advised appellant of its preliminary examination of the application by letter dated July 2 (JA 29), which was considerably more than six weeks after appellant had submitted its application. Even if appellant had submitted the application on April 3, 1965 (the very day after the Public Notice), it is evident that the FCC Staff would not have processed the application within sufficient time to notify appellant before the cut-off date that any confirmatory evidence or other supplemental information was wanted. The effort to suggest that appellant should have acted more expeditiously is another indication of the arbitrariness which has characterized FCC's handling of this entire proceeding.

CONCLUSION

For the foregoing reasons, as well as those being urged by the appellant, this case should be remanded to the Commission with instructions to accept the appellant's application for filing.

Respectfully submitted,

HAROLD HORVITZ
GITTA M. KURLAT
Guterman, Horvitz & Rubin
50 Congress Street
Boston, Massachusetts

THOMAS D. BURNS
STEPHEN N. SUBRIN
Burns & Levinson
77 Franklin Street
Boston, Massachusetts

BENNETT BOSKEY
EDWARD A. GROOBERT
Volpe, Boskey and Lyons
918 16th Street, N. W.
Washington, D. C. 20006

Counsel for
Barkley & Dexter Laboratories,
Inc. and Norman L. Rivers,
Amicus Curiae

September, 1967